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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 604

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC., APPELLANTS,

vs.

G. A. F. SEELIG, INC.

No. 605

G. A. F. SEELIG, INC., APPELLANT,

vs.

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED DECEMBER 17, 1934.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1935.

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-174

G. A. F. SEELIG, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others, Defendants

STIPULATION AS TO TRANSCRIPT OF RECORD

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States the solicitors for the respective parties to the appeal and cross-appeal herein designate the following documents as constituting the true and complete transcript herein, for the purpose of both appeals:

1. Bill of Complaint, verified by Walter J. Seelig, May 28, 1934, including following exhibits:

A. Ch. 158 of N. Y. Laws of 1933.
B. Official Order No. 17.
C. Official Order No. 33.
D. Ch. 126 of N. Y. Laws of 1934.
E. Sections 39-41 of A. & M. Law.

2. Affidavits of J. Daniel Dougherty and Walter J. Seelig, verified May 28, 1934, including two letters made exhibits.
3. Order to show cause, dated May 31, 1934.
4. Answering affidavit of Kenneth F. Fee, verified June 7, 1934, including three exhibits as follows:

A. Contract between Seelig corporations.
B. Table of alleged underpayments.
C. Receipts of milk in New York City market in April, 1934.

[fols. b & c] 5. Opinion of Circuit Judge Learned Hand dated August 2, 1934.

6. Submission of motions and stipulation of facts, including five exhibits as follows:

A. (Identical with 4-A above).
B. (Identical with 1-B above).
C. (Identical with 1-C above).
D. (Identical with 4-B above).
E. (Identical with 4-C above).

7. Final decree dated November 16, 1934.
8. Petition for appeal and assignment of errors.
9. Petition for cross-appeal and assignment of errors.
10. Joint statement as to jurisdiction.
11. Order allowing appeal and cross-appeal.
12. Citation on appeal.
13. Citation on cross-appeal.
14. This stipulation.

Dated December 14, 1934.

Henry S. Manley, Solicitor for Defendants, as Appellants and as Cross-Appellees. John J. O'Connor, Solicitor for Plaintiff, as Cross-Appellant and as Appellee.

So ordered.

Robert P. Patterson, U. S. D. J.

[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-174

G. A. F. SEELIG, INC., Plaintiff,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, Defendants

BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:

G. A. F. Seelig, Inc., bring this its bill of complaint against Charles H. Baldwin, as Commissioner of Agricul-

ture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, and respectfully shows unto your Honors, as follows:

[fol. 2] First. The plaintiff, G. A. F. Seelig, Inc., was at all times hereinafter mentioned and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State, and a resident of the Southern District of New York.

Second. The defendant, Charles H. Baldwin, is the duly appointed, qualified and acting Commissioner of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Commissioner in the Southern District of New York.

Third. The defendant, Kenneth F. Fee, is the duly appointed, qualified and acting Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Director in the Southern District of New York.

Fourth. The defendant, John J. Bennett, Jr., is the duly elected, qualified and acting Attorney General of the State of New York, and a citizen and resident of said State, and maintains an office for the regular conduct of his duties as such Attorney General in the Southern District of New York.

Fifth. The defendant, William C. Dodge, is the duly elected, qualified and acting District Attorney of the County of New York and is a citizen and a resident of said State. The defendant, William C. Dodge, as District Attorney as aforesaid, maintains his offices for the regular conduct of [fol. 3] his duties as such District Attorney in the Southern District of New York.

Sixth. The ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in

equity and arises under the Constitution of the United States, as will hereinafter more fully appear. The amount in controversy in this suit exceeds the sum or value of Three thousand dollars ($3,000.00), exclusive of interest and costs.

Seventh. The plaintiff is engaged and at all times hereinafter mentioned and for many years prior to April 10, 1933, was continuously engaged in the business of purchasing and handling and selling fluid milk and cream in and about the City of New York, State of New York, said City having a population of over one million inhabitants. The plaintiff has built up a large and extensive business in the said City in the sale of fluid milk, chiefly in can lots, to consumers and to hospitals, grocery stores, hotels, restaurants, soda fountains, dairy products stores and similar mercantile establishments, and has owned and operated a plant in the Borough of Manhattan, City of New York, for many years, for the distribution and sale of fluid milk and cream in and about the City of New York, in wholesale lots, that is, chiefly in "can lots," as distinguished from bottled milk, as hereinabove stated.

Eighth. The plaintiff, in handling approximately 20,000 pounds of milk daily, is, in comparison with others engaged in the same branch of the milk business in New York City, one of the smaller milk dealers. The said plaintiff purchases, under contracts which are renewed annually, all the [fol. 4] output of milk of the Seelig Creamery Corporation. The said Seelig Creamery Corporation is a corporation organized and existing under the laws of the State of New York, but doing no business within the State of New York. It owns and operates a creamery for the processing of milk at Fair Haven, in the State of Vermont, and conducts all of its operations at that place, its business being conducted under and pursuant to the laws of the State of Vermont as a foreign corporation in that state, licensed to do business in and by the said State of Vermont, and under and pursuant to the laws of Vermont governing the operations of creameries in that State. The said Seelig Creamery Corporation is not a producer of milk, but buys from certain selected farmers or producers of the Milk Shed in and about Fair Haven, Vermont, all the milk offered to it daily. The operations of the said Seelig Creamery Cor-

poration are confined wholly to the State of Vermont, and at all times hereinafter mentioned and for many years prior to April 10, 1933, said Seelig Creamery Corporation so conducted its business. The plaintiff and said Seelig Creamery Corporation are, and at all times hereinafter mentioned were, wholly separate and distinct corporate entities and neither corporation owns, holds or controls stock in the other.

Ninth. On April 10, 1933, and at all times hereinafter mentioned, the plaintiff was continuously engaged in the business of importing, selling and distributing fluid milk and cream in the City of New York, which milk and cream was and is purchased from said Seelig Creamery Corporation, F. O. B. Fair Haven, Vermont, and from other creameries situated at that place.

[fol. 5] Tenth. The plaintiff has duly obtained from the Board of Health of the City of New York all such licenses and permits as are required by the Sanitary Code of the said City or the regulations adopted thereunder for the lawful conduct of the plaintiff's said business, and the plaintiff has duly kept, observed and performed all the provisions of said Sanitary Code and the regulations adopted thereunder.

Eleventh. On or about the 10th day of April, 1933, the Governor of the State of New York approved Chapter 158 of the Laws of 1933, enacted by the Legislature of said State, which said chapter amended the Agriculture and Markets Law, being Chapter 69 of the Consolidated Laws of New York, by adding thereto a new Article 25. A full, true and correct copy of said Chapter 158 of the Laws of 1933 is annexed hereto and marked "Exhibit A" and made a part hereof.

Twelfth. In and by the said Article 25 (Exhibit A), a new temporary state agency, known as the Milk Control Board, was created, to continue in existence until March 31, 1934, and was given power until said date to regulate as the emergency required all matters pertaining to the production, manufacture, storage, transportation, disposal, distribution and sale of milk and milk products in the State of New York. It was further provided in and by the said Article 25 that the said Milk Control Board should fix by of-

ficial order the minimum wholesale and retail prices, and might fix by official order the maximum wholesale and retail prices, to be charged for milk handled within the State of New York for fluid consumption.

[fol. 6] Thirteenth. In and by sub-section "(g)" of Section 312 of said Article 25.(Exhibit A), it was provided:

"(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

Fourteenth. On May 12, 1933, effective May 16, 1933, the Milk Control Board adopted an order known as Official Order No. 17, a full, true and correct copy of which is annexed hereto and marked "Exhibit B" and made a part hereof. Said order was subsequently amended by Official Order No. 19, Official Order No. 28, Official Order No. 32 (effective July 1, 1933), by Official Order No. 34 (effective July 21, 1933), by Official Order No. 41 (effective September 18, 1933), and by Official Order No. 43 (effective October 16, 1933). Official Order No. 17 (Exhibit B) established minimum prices to be paid by milk dealers to producers for milk in accordance with the "classified price plan," which price plan was and is based upon the ultimate utilization by the dealers of the milk so purchased. The subsequent official orders herein recited made certain amendments to or changes in the [fol. 7] prices to be paid by the milk dealer to the producer, but did not materially change the general price structure set up by said Official Order No. 17 (Exhibit B).

Fifteenth. On or about June 30, 1933, the Milk Control Board adopted an order known as Official Order No. 33, effective July 1, 1933, a full, true and correct copy of which

is annexed hereto, marked "Exhibit C" and made a part hereof. Under and by virtue of the said Official Order No. 33 the purchase or sale by or to a milk dealer of fluid milk (followed by the utilization of the same within New York State) at a price less than the sum of the minimum price established by the Milk Control Board to be paid to producers for such milk, irrespective of where such producers might be located, was forbidden.

Sixteenth. On or about the 30th day of March, 1934, the Governor of the State of New York approved Chapter 126 of the Laws of 1934 enacted by the Legislature of said State, which said Chapter amended the said Agriculture and Markets Law by repealing Article 21 thereof. A full, true and correct copy of said Chapter 126 of the Laws of 1934 is annexed hereto and marked "Exhibit D" and made a part hereof. Said Article 25 (Exhibit A) expired on March 31, 1934, by its own limitations.

Seventeenth. It is provided in and by the said Article 21 and Article 21-A (Exhibit D) that the functions, powers and duties of the Milk Control Board created by the said Article 25 (Exhibit A), except as modified in and by the said Article 21 and Article 21-A (Exhibit D), shall be exercised and performed by a division in the Department [fol. 8] of Agriculture and Markets to be known as the Division of Milk Control. It is further provided that the Department of Agriculture and Markets shall be vested with the powers theretofore conferred upon the Milk Control Board by the said Article 25 (Exhibit A), and that the said Commissioner may adopt and enforce all rules and all orders necessary to carry out the provisions of the said Article 21 and Article 21-A (Exhibit D).

Eighteenth. In and by Section 258-i of said Article 21 (Exhibit D), it is provided that the rules and orders of the Milk Control Board in effect at the time of the transfer to the Division of Milk Control of the powers, duties and functions theretofore vested in the Milk Control Board or the Commissioner of Agriculture and Markets shall remain in full force and effect until otherwise provided by the said Commissioner.

Nineteenth. The said Official Order No. 17 (Exhibit B) and said Official Orders amendatory thereof, as hereinabove

set forth, and Official Order No. 33 (Exhibit C) are deemed by the defendants to be in full force and effect.

Twentieth. In and by subsection 4 of Section 258-m of said Article 21-A (Exhibit D) it was provided:

"4. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any [fol. 9] such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

This subsection is a reenactment of subdivision "g" of Section 312 of Article 25 (paragraph Thirteen of Bill of Complaint).

Twenty-first. The plaintiff has continually for many years purchased milk from the Fair Haven, Vermont, Milk Shed, from other creameries located at or near Fair Haven, Vermont, as well as from Seelig Creamery Corporation, as aforesaid. Plaintiff has never at any time had or used any other milk shed than that located in and about Fair Haven, Vermont, as a source of its milk supply. All milk purchased by plaintiff from any of the creameries at Fair Haven, Vermont, is purchased under yearly contracts, running from April 1st to March 31st of each year, between the plaintiff and the respective creameries and all purchases are made F. O. B. Fair Haven, Vermont.

Twenty-second. As to the sale of milk by the plaintiff to consumers within the State of New York, and chiefly within the City of New York, where it finds its market, the plaintiff has at all times followed and complied with the rules and orders of the Milk Control Board governing such sales and the prices charged for its products.

[fol. 10] Twenty-third. In and by Section 257 of the said Article 21 (Exhibit D), it is provided that no milk dealer

(said term being defined in Section 253 of the said Article to include any person who purchases or handles milk, other than a hotel or restaurant which sells only milk consumed on the premises where sold or a producer who delivers milk only to a milk dealer) shall buy or sell or distribute milk unless such dealer be licensed as provided in said Article 21. It is further provided in and by Section 258 of said Article 21 that every milk dealer shall file on or before April 30, 1934, an application for the license so required to be obtained upon a blank prepared under authority of the Commissioner of Agriculture and Markets. It is further provided in and by Section 258-c of said Article 21 that the said Commissioner may refuse to grant a license or may revoke a license already granted when he is satisfied of the existence of any of the reasons set forth in said Section 258-c. It is further provided in and by Section 258-e of said Article 21 that the said Commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of the statutes, rules and orders committed to his administration and in addition to any other remedy under Article 3 of the said Agriculture and Markets Law or otherwise may apply for relief by injunction.

Twenty-fourth. The defendant Charles H. Baldwin, as Commissioner of Agriculture and Markets, requires as a prerequisite to the granting of the licenses required to be obtained by the plaintiff as a milk dealer pursuant to the provisions of Section 258 of the said Article 21 (Exhibit D) that the plaintiff shall agree in writing to comply with and obey the provisions of said Agriculture and Markets Law [fol. 11] and the rules and orders promulgated by the said Commissioner. Unless such an agreement is made by the plaintiff, the Commissioner will not grant such license to it.

Twenty-fifth. In and by Sections 38, 39 and 40 of the said Agriculture and Markets Law (a full, true and correct copy of which Sections is annexed hereto and marked "Exhibit E" and made a part hereof), it is provided that every person, firm, corporation or association who shall, by himself, itself or through his or its agents, officers and employees, violate any of the provisions of said law or of any other law the enforcement of which is within the jurisdiction of the Department of Agriculture and Mar-

kets, or who shall fail to obey any order of the Commissioner of Agriculture and Markets, or who shall violate any rule of the said Department, shall be subject to certain money penalties in the said Sections more particularly set forth, and that in an action for the recovery of any such penalty or forfeiture for the violation of such law or of such rule an application may be made on the part of the people for an injunction to restrain the defendant, his agents, and employees, from the further violation thereof.

Twenty-sixth. In and by Section 41 of the said Agriculture and Markets Law (a full, true and correct copy of which Section is hereto annexed, marked "Exhibit F" and made a part hereof), it is provided that the violation of any of the provisions of the said Agriculture and Markets Law constitutes a misdemeanor, punishable by fine or imprisonment or both.

Twenty-seventh. Under and by virtue of said Article 21 [fol. 12] and Article 21-A (Exhibit D), the defendant Charles H. Baldwin, as Commissioner of Agriculture and Markets, and the defendant Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, are charged with the duty of enforcing the provisions of the said Article 21 and Article 21-A and the said Official Orders and the amendments thereof, as hereinbefore set forth.

The said defendants, in their said official capacities, have, after application duly made therefor by the plaintiff, rejected said plaintiff's application for a license and have refused to issue to the plaintiff the license which plaintiff is required to obtain pursuant to said Article 21, on the ground that the plaintiff has failed to agree in writing to comply with and obey the provisions of said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner and in particular because of plaintiff's refusal to agree not to sell within the State of New York, after it has come to rest within said State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State under similar conditions, and the said defendants, in their said official capacities, have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets

Law if the plaintiff shall continue its business as a milk dealer on or after May 1, 1934, without having first obtained the required license.

Twenty-eighth. Under and by virtue of the said Agriculture and Markets Law, the defendant John J. Bennett, Jr., as Attorney General of the State of New York, is charged with the duty of causing an action or proceeding to be brought in the name of the People of the State of [fol. 13] New York for the recovery of any penalty or forfeiture incurred under the provisions of Sections 39 and 40 of said Law (Exhibit E).

The said defendant, in his said official capacity, may institute criminal proceedings against the plaintiff if the plaintiff shall, without first having obtained the required license, continue its business as a milk dealer on or after May 1, 1934, and may also institute criminal proceedings against the plaintiff if it shall sell or attempt to sell, within New York State, milk or cream purchased from producers without the State, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions.

Twenty-ninth. Under and by virtue of the said Agriculture and Markets Law and other applicable statutes of the State of New York, the defendant William C. Dodge, as District Attorney of the County of New York, is charged with the duty of prosecuting any person or corporation guilty of a violation of Section 41 of said Agriculture and Markets Law (Exhibit F).

The said defendant, in his said official capacity, may institute criminal proceedings against the plaintiff if the plaintiff shall, without first having obtained the required license, continue its business as a milk dealer on or after May 1, 1934, and may also institute criminal proceedings against the plaintiff if it shall sell or attempt to sell, within New York State, milk or cream purchased from producers without the State, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions.

Thirtieth. The penalties attached to a violation of the [fol. 14] provisions of said Article 21 and Article 21-A (Exhibit D) and the Official Orders adopted thereunder by the Commissioner of Agriculture and Markets are so great

that the plaintiff may not sell within New York State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk and — produced within the State, purchased under similar conditions, even for the purpose of testing the constitutionality and validity of said Articles and said Official Orders, and unless this Court shall determine the validity of the said Articles and said Official Orders in this proceeding, the plaintiff, its officers, agents and employees will be compelled to submit to said Articles and said Official Orders, whether the same be valid or invalid, and the plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws in violation of the provisions of the Constitution of the United States.

A. In that Article 21 and Article 21-A, as interpreted in their administration by the defendants, is an attempt to interfere with and prohibit the plaintiff from importing milk into New York State from a foreign State, and contravene the provisions of the United States Constitution, Article I, Section 8, providing that Congress shall have the sole power to regulate commerce among the several states, and are void and unconstitutional.

B. In that Article 21 and Article 21-A, as interpreted and administered by the defendants, in requiring plaintiff to purchase milk only at a price fixed by defendants, when such purchases are made outside the State of New York, contravene the provisions of the United States Constitu- [fol. 15] tion, Article I, Section 8, providing that Congress shall have the sole power to levy imposts and duties upon products coming in from another State, and are void and unconstitutional.

C. In that Article 21 and Article 21-A are void and unconstitutional for the reason that said Articles are arbitrary interference with the freedom of contract and an attempt to render invalid the present and existing contracts for the purchase and sale of milk and cream, heretofore made by and between the plaintiff and the creameries located in and about Fair Haven, Vermont, and contravene the provisions of the Fourteenth Amendment to the United States Constitution providing that no person shall be deprived of property without due process of law.

D. In that all transactions between the plaintiff and the creameries from which it purchases its milk and cream, located in and about Fair Haven, Vermont, are conducted and consummated in the State of Vermont and constitute interstate commerce and are not subject to the jurisdiction, direction or control of the Division of Milk Control represented by the defendants herein.

Thirty-first. By reason of the said Articles and the said Official Orders, the plaintiff's entire business as a milk dealer is and will continue to be threatened with total extinction, with resultant loss and damage, for which it has and can have no recourse.

Thirty-second. The plaintiff has no adequate remedy at law and is relievable only in a court of equity.

[fol. 16] Wherefore, and inasmuch as the plaintiff can have adequate relief only in a court of equity, the plaintiff prays:

1. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, John J. Bennett, Jr., as Attorney General, and William C. Dodge, as District Attorney of the County of New York, and each of them, from bringing or prosecuting, or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents or employees thereof, by reason of the plaintiff selling or attempting to sell, within the State of New York, milk or cream purchased from producers without the State of New York, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions;

(b) Against any other person, firm, corporation or association, or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of said Agriculture and Markets Law to be obtained and held by

any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased [fol. 17] from producers without the State of New York at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions;

(c) Against the plaintiff or any officer, agent or employee thereof, by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the license required by Article 21 of said Agriculture and Markets Law, or against any other person, firm, corporation or association, or any officer, agent or employee thereof, or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased from producers without the State of New York at a price lower than that required to be paid producers within the State purchased under similar conditions, or in any way dealing in or handling milk of the plaintiff, although the plaintiff shall not have obtained the license required by Article 21 of said Agriculture and Markets Law, provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by Article 21 of the Agriculture and Markets Law other than (1) by having refused to agree in writing, on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date not to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid pro- [fol. 18] ducers for milk or cream produced within the State purchased under similar conditions, or (2) by the sale to or the purchase from said plaintiff by any person, firm, corporation or association of any such milk purchased by plaintiff from producers without the State of New York at a price lower than that required to be paid producers for milk or cream produced within the state purchased under similar conditions.

2. That the said Article 21 and Article 21-A and the said Official Orders, insofar as the said Articles and Official Orders (1) prohibit or restrain the plaintiff from purchasing or selling milk or cream within New York State purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions and (2) prohibit or restrain any person, firm, corporation or association from selling to or purchasing from the plaintiff milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions, be declared to be unconstitutional, illegal and void, in that they violate the provisions of Article I, Section 8, and of the Fourteenth Amendment to the Constitution of the United States, by attempting to regulate commerce between the several States, by attempting to levy imposts and duties upon products coming from another State and by depriving plaintiff of its property without due process of law and by depriving plaintiff of the equal protection of the laws, and that an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the enforcement of said Articles and Official Orders as hereinabove prayed for.

3. That the plaintiff may have such other and further [fol. 19] relief in the premises as the nature of the case may require and as may be in accordance with equity.

4. That a writ or writs of subpoena be directed to the said defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, John J. Bennett, Jr., as Attorney General of the State of New York, and William C. Dodge, as District Attorney of the County of New York, commanding them, and each of them, at a certain time and under a certain penalty therein to be named, to be and appear before this Honorable Court then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to

abide by and perform such other and further orders or decrees as to the Court shall seem meet.

John J. O'Connor, 2 Lafayette Street, New York, N. Y., Solicitor for Plaintiff.

[fol. 20] *Duly sworn to by Walter J. Seelig. Jurat omitted in printing.*

[fol. 21-43] EXHIBIT A to BILL of COMPLAINT

Laws of New York.—By Authority

CHAPTER 158

An Act to amend the agriculture and markets law, in relation to milk control during the existing emergency, creating the milk control board and defining its jurisdiction, powers and duties

Became a law April 10, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

[Text of law omitted in printing]

[fol. 44] EXHIBIT B TO BILL OF COMPLAINT

State of New York

Department of Agriculture and Markets

Milk Control Board

Official Order No. 17

As Amended and Supplemented by Official Order No. 19

In the Matter of Fixing Minimum Prices to be Paid by Milk Dealers to Producers and Others for Milk

Such investigations and proofs as the emergency permits having been made, and public hearing having been had after reasonable notice to the public generally through

newspapers and otherwise, and due deliberation having been had, it is hereby ordered:

1. For the purposes of this order milk is classified as to its uses, into nine classes, as follows:

(a) Class 1 milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization by human consumption as raw or pasteurized milk. It includes all milk leaving a milk plant or receiving station in fluid form, in the absence of clear proof that such milk is so utilized as to fall into some other class. It also includes all milk utilized in any manner not included within the classes defined hereinafter.

"In the case of a dealer who receives or handles not more than fifteen hundred forty-quart cans of milk (or its equivalent) per month, any part of which is Class 1 [fol. 45] milk, at least seventy-five per cent of all milk (or its equivalent) received or handled by him shall be included in Class 1, and remainder in Class 2-A."

(b) Class 2-A milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as fluid cream. It includes all milk made into sweet or sour cream and leaving a milk plant or receiving station in such form, in the absence of clear proof that such milk is so utilized as to fall into some other class.

"(c) Class 2-B milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as plain condensed milk and in certain forms of cheese. It includes milk made into plain condensed milk, all milk used in the manufacture of cheeses of the soft type, such as Neufchatel, Pimento, Pimento Olive, D'Isigny, Port DeSalut, Lunch, Kosher, Petit Suisse, etc., and any other cheese except those specified by name in Classes 3 and 4-B."

"(d) Class 2-C includes all milk used in the manufacture of ice cream in New York City and milk from which is de-

rived fresh or storage cream and unsweetened condensed milk, used in the manufacture of ice cream in New York City. It also includes milk from which is derived storage cream used in the manufacture of sour cream."

"(d-1) Class 2-D includes all milk used in the manufacture of ice cream outside of New York City and milk from [fol. 46] which is derived cream and unsweetened condensed milk used in the manufacture of ice cream outside of New York City.

"(d-2) Class 2-E includes all milk from which is derived storage cream used in the manufacture of cream cheese."

"(e) Class 3 milk includes milk which is used in the manufacture or sterilized and evaporated whole milk, sweetened whole condensed milk, milk chocolate, whole milk powder, powdered malted milk; also all milk to which milk fat is added that is used in the manufacture of milk powder; also all milk that is used in the manufacture of Cream, Swiss, Limburger, Munster, Pineapple, Edam, Gouda, De Brie, Camembert, Hard Italian, Brick, Farmers Pressed Cheese and other cheeses of similar type."

(f) Class 4-A milk shall include all milk that is made into butter.

(g) Class 4-B milk shall include all milk that is made into American Cheese.

2. It shall be presumed, in the absence of clear proof to the contrary, that any milk purchased or received or handled by a milk dealer, except at a plant or receiving station engaged continuously and solely in manufacturing the milk, leaves such plant or receiving station in fluid form.

3. It shall likewise be presumed, in the absence of clear proof to the contrary, as to any milk dealer buying milk within the State of New York, and also buying elsewhere, [fol. 47] that all milk marketed or utilized within the State in Class 1 is milk purchased within the State to the full amount available therefore, and likewise as to each successive lower class.

4. The prices hereinafter established shall not apply to milk sold to the state or any municipality or to the federal

government upon bids, but any milk dealer claiming exemption under such provisions shall make written and verified application for such exemption, in form satisfactory to the Board, if possible before purchasing or receiving or handling the milk as to which exemption is claimed.

5. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 1 milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-210 miles distant from New York City. No off rail differential shall be allowed except as specially authorized by the Board. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction:

(a) Freight differential. The actual price for Class 1 milk marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk is ascertained by adding to the base price at the 201-210 mile freight zone 53c per 100 pounds, and deducting from the result thereby obtained the actual freight rate applying per 100 pounds of milk from there to New York City, but there shall not be deducted an amount in excess of 69c per [fol. 48] 100 pounds. A schedule hereto annexed indicates the freight differential which is to be applicable until further notice. There shall be no freight differential for Class 1 milk marketed for consumption elsewhere in the State than in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk. Milk received or handled at a milk plant or receiving station less than 200 miles from New York City shall be presumed to be marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk in the absence of clear proof to the contrary.

(b) Milk fat differential. The actual price is ascertained by adding to the base price in the case of milk testing more than 3.5%, or subtracting from the base price, in the case of milk testing less than 3.5%, four cents per 1/10th of 1% of milk fat.

(c) Grade A differentials. Milk which is qualified under the New York City Department of Health requirements for sale as Grade A, and which is delivered to plant sim-

ilarly qualified, shall have added to the base price the following differentials:

Butterfat	10,000 or less bacteria colonies per c. c.	10,001 to 25,000 bacteria colonies per c. c.
3.0	.05	.025
3.1	.075	.05
3.2	.10	.05
3.3	.15	.075
3.4	.20	.10
3.5	.25	.15
3.6	.30	.20
3.7	.35	.25

[fol. 49] No increased differential for additional points of butterfat above 3.7%. Existing arrangements between any cooperative association and milk dealers buying through it from its producer members, affecting Grade A, differentials, may be continued.

6. The base price established by this order for Class 1 milk is $1.88.

7. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-A milk. Such base price shall be based upon the delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction.

(a) Freight differential. The base price shall apply to all points 201-225 miles, both inclusive, from New York City, with 1c per 100 pounds of milk added for every 25 mile zone under 201 miles, and 1c per 100 pounds of milk deducted for every 25 mile zone over 225 miles.

(b) Milk fat differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

(c) Grade A differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

8. The base price established by this order for Class 2-A milk is $1.30.

[fol. 50] 9. The Board will establish by this order, and may from time to time change by other orders or by amend-

ing orders, a base price for Class 2-B milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to the same differentials provided for Class 2-A milk.

10. The base price established by this order for Class 2-B milk is $1.50.

11. "The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-C milk, a base price for Class 2-D milk, and a base price for Class 2-E milk. Such price in in each case shall be based upon deliveries of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price in each case shall be subject to the same differentials provided for Class 2-A milk."

12. "The base price established by this order for Class 2-C milk is $1.20.

"The base price established by this order for Class 2-D shall be not less than 10 cents more than the price determined for Class 4-A.

"The base price established by this order for Class 2-E shall not be less than 19 cents more than the price determined for Class 4-A."

13. The price for Class 3 milk shall be the average paid at midwest condenseries, as determined by the Board at the [fol. 51] end of each month, plus not less than 10c per hundred pounds of milk, the milk fat differential to be figured upon a direct ratio between milk fat content and price. The prices above fixed apply to all points 201-250 miles, both inclusive, from New York City, with 1c per 100 pounds of milk added for every 50 mile zone under 201 miles, and 1c per 100 pounds of milk deducted for every 50 mile zone over 250 miles.

14. The price for Class 4-A milk shall be determined for the month during which the milk is handled, by taking the official New York average outside quotations for 92 score butter, deduct four cents a pound for making, and figure an overrun of 16%.

15. "The price for Class 4-B milk shall be determined for the month during which the milk is handled, by taking the official New York City average price for New York State average run colored and uncolored flats, or the average price for fresh Wisconsin single daisy cheese in New York City as quoted by the U. S. Department of Agriculture, whichever is higher, less three cents per pound of cheese allowance for making, and compute according to the yield of cheese per 100 pounds of milk as follows:

B. F. Test	Cheese Yield	B. F. Test	Cheese Yield
3.0%	8.30	4.3%	11.29
3.1%	8.53	4.4%	11.52
3.2%	8.76	4.5%	11.75
3.3%	8.99	4.6%	11.98
3.4%	9.22	4.7%	12.21
3.5%	9.45	4.8%	12.44
3.6%	9.68	4.9%	12.67
3.7%	9.91	5.0%	12.90
3.8%	10.14	5.1%	13.13
3.9%	10.37	5.2%	13.36
4.0%	10.60	5.3%	13.59
4.1%	10.83	5.4%	13.82
4.2%	11.06	5.5%	14.05

[fol. 52] 16. The prices hereby established shall be the minimum prices to be paid by milk dealers to producers and their representatives for milk of the respective classes mentioned; provided, that the prices hereby established shall not apply to purchases by a milk dealer who does not purchase or handle any Class 1 or Class 2 milk. From and after the effective date of this order, and until the Board orders otherwise, no milk dealer shall purchase or receive or handle milk unless payment is made to the producer, or to a co-operative corporation organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, for the benefit of its producers, at a rate not less than the rates hereby established. Such payment shall be made in cash or by check not more than forty-six days after delivery of the milk from the producer or on his behalf. Such payment shall be based upon the aggregate of milk received at the plant or receiving station from all producers during the period

covered by the payment, except that the Board may, by special permit to specific milk dealers, authorize them to base payment upon the aggregate of milk received at several plants or receiving stations which are operated together for marketing purposes, or make other special provision. Where some milk included in the payment is of two or more different classes the payment shall be at a rate which will truly represent the proportions of each.

17. No milk dealer shall buy or offer to buy milk at any price less than the price hereby established applicable to such transaction and no method or advice shall be employed whereby milk is bought or offered to be bought at any lesser [fol. 53] price, whether by any discount, or rebate, or excessive charge of hauling or other service, or any other method or device whatsoever. Any method or device which is employed in an effort to defeat the intent of this order as well as any direct violation of it, will be deemed sufficient cause to suspend or revoke the license of the offending milk dealer without further or specific warning.

18. Not later than the 8th day of each month, except as the Board may otherwise provide in special cases, every milk dealer shall file with the Board a report covering individually each milk plant or receiving station operated by him, except as the Board may otherwise provide in special cases, giving in detail covering the preceding month the following information:

(a) Name of dealer and location of plant.

(b) Total amount of milk received from all sources.

(c) The average price per hundred pounds of 3.5 milk delivered at the plant, computed according to the prices established by this order and any amendment thereof.

(d) Whether payment is made by the dealer directly to producers, or to a co-operative associations, and upon what date or dates payment will be made.

(e) Number of producers.

(f) Total amount of milk utilized under each of the various classes and the price for each such class.

Such report shall be in a form to be prescribed by the Board and shall be sworn to by the milk dealer, or by a [fol. 54] responsible and well informed officer or employee

acting for him. The milk dealer shall keep available at his office, if a regular office is maintained separate from the milk plant or receiving station, and otherwise at such plant or station, for at least one year after filing such reports, the books of account and other records upon which it is based, which shall be in form readily to substantiate and afford a check upon the information contained in the reports. Such records shall include the full name and post office address of each individual producer from whom the dealer has received milk, together with his serial number, the number of pounds of milk received from each individual producer, and the milk fat tests as determined by the dealer. Such records shall also include records of every shipment and sale of any milk or milk product from the milk plant or receiving station.

19. This order shall take effect at 1 A. M. Eastern Standard Time on Tuesday, May 16, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated, Albany, N. Y., May 12, 1933.

[fol. 55] Zone Prices and Freight Differential Official Order No. 17

Miles	Freight Rate 40 Quart Can Class 1 Milk	Freight Allowance per 100 Class 1 Milk	Miles	Freight Rate 40 Quart Can Class 1 Milk	Freight Allowance per 100 Class 1 Milk
10 or under	$.235	$.275	201–210	$.455	$.530
11–20	.245	.285	211–220	.470	.545
21–25	.265	.310	221–225	.475	.550
26–30	.265	.310	226–230	.475	.550
31–40	.275	.320	231–240	.480	.560
41–50	.295	.345	241–250	.485	.565
51–60	.305	.355	251–260	.500	.580
61–70	.320	.370	261–270	.505	.585
71–75	.330	.385	271–275	.510	.595
76–80	.330	.385	276–280	.510	.595
81–90	.340	.395	281–290	.515	.600
91–100	.355	.415	291–300	.530	.615
101–110	.360	.420	301–310	.535	.620
111–120	.370	.430	311–320	.540	.630
121–125	.385	.450	321–325	.545	.635
126–130	.385	.450	326–330	.545	.635
131–140	.395	.460	331–340	.560	.650
141–150	.400	.465	341–350	.565	.655
151–160	.415	.485	351–360	.570	.665
161–170	.420	.490	361–370	.575	.670
171–175	.430	.500	371–375	.580	.675
176–180	.430	.500	376–380	.580	.675
181–190	.440	.510	381–390	.590	.685
191–200	.450	.525	391–400	.595	.690

[fol. 56] EXHIBIT C TO BILL OF COMPLAINT

State of New York

Department of Agriculture and Markets

Milk Control Board

Official Order No. 33

In the Matter of the Fixing of Intermediate Prices

Such investigations and proofs as the emergency permits having been made, and public hearings having been had after notice which in the judgment of the Board is sufficient, and due deliberation having been had, it is hereby ordered, that

Any continuous and regular purchase or sale or delivery or receipt of milk passing to a milk dealer at any place and available for utilization as fluid milk and/or cream within New York State, followed by such utilization in one or more instances, where the price involved in such purchase or sale or delivery or receipt is less than the sum of the minimum price established to be paid to producers for such milk plus actual costs of transporting and handling and processing such milk to the place and to the condition involved in such purchase or sale or delivery or receipt, hereby is forbidden.

This order shall take effect on Saturday, July 1, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated: Albany, N. Y., June 30, 1933.

[fols. 57-86] EXHIBIT D TO BILL OF COMPLAINT

Laws of New York.—By Authority

Chapter 126

An Act to amend the agriculture and markets law, in relation to creating a division of milk control, defining its jurisdiction, powers and duties, and continuing certain special powers and duties during the existing emergency, and making an appropriation therefor

Became a law March 30, 1934, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

[Text of law omitted in printing]

[fol. 87] EXHIBIT E TO BILL OF COMPLAINT

Sec. 39. Penalties for violation of chapter or other laws. Every person violating any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department shall, except where other penalties are hereinafter prescribed, be subject to a penalty in the sum of not less than twenty-five dollars nor more than one hundred dollars for the first violation, nor more than two hundred dollars for the second and each subsequent violation; provided, however, that for a violation by a retail merchant of section two hundred and twelve of this chapter, or of article thirteen-a of this chapter, the minimum penalty shall be ten dollars. When such violation consists of the manufacture or production of any prohibited article, each day during which or any part of which such manufacture or production is carried on or continued, shall be deemed a separate violation. When the violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation, and each day on which any such article or substance is offered or exposed for sale or exchange shall constitute a separate violation. If the sale be of milk

and it be in cans, bottles or containers of any kind and if the milk in any one of such containers be adulterated, it shall be deemed a violation whether such vendor be selling all the milk in all of his containers to one person or not. When the use of any such article or substance is prohibited, each day during which or any part of which such article or substance is so used or furnished for use, shall constitute a separate violation, and the furnishing of the same for use to each person to whom the same may be furnished shall [fol. 88] constitute a separate violation. When the storage of any article is prohibited beyond a certain period, each day during which or any part of which any article is so stored beyond the period provided for by this chapter, shall constitute a separate violation.

A right of action for the recovery of, or a liability for, penalties incurred as provided in this chapter, or in any other law the enforcement of which is within the jurisdiction of the department, may be released, settled or compromised before the matter is referred to the attorney-general as provided in section forty-four of this chapter, and thereafter may be released, settled or compromised by the attorney-general, either before or after an action is brought to recover such penalties.

Sec. 40. Penalty for violation of rule or order. Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, so long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order of the commissioner, or who shall violate any rule of the department, shall be subject to a penalty not exceeding the sum of two hundred dollars for each and every offense. Every violation of such order, or of the rules of the department, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

[fols. 89 & 90] EXHIBIT F TO BILL OF COMPLAINT

Sec. 41. Violation of chapter a misdemeanor. Except as otherwise provided by the penal law, a person who by him-

self or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. DANIEL DOUGHERTY

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

J. Daniel Dougherty, being duly sworn, deposes and says:

I am an attorney and counsellor-at-law, associated with John J. O'Connor, solicitor for the plaintiff herein, and am familiar with the matters hereinafter stated.

On or about November 13, 1933, there were served upon the plaintiff above named the summons and complaint, together with motion papers for a temporary injunction against the plaintiff in his action, wherein the predecessors in office of the above named defendants, other than the District Attorney of the County of New York and the Attorney General of the State of New York, were plaintiffs, arising out of the Supreme Court of the State of New York, Albany County. The motion for an injunction in said pro-
[fol. 92] ceeding in the New York State Supreme Court was withdrawn, but subsequently a notice of trial was served by the Milk Control Board, the plaintiffs in said action, and when the matter reached the Trial Calendar in January, 1934, it was referred to the Honorable Frank H. Hiscock as Referee. No further steps have been taken in said New York State Supreme Court action.

With the enactment of Articles 21 and 21-A of the Agriculture and Markets Law and the rejection of the plaintiff's application for a license, the Milk Control Board, as plaintiff in said New York State action, have, in effect at least, received all the relief or judgment they were seeking against the plaintiff in this New York State Court action, possible. In other words, a continuation of the New York State action would, in the mind of deponent, be wholly and solely academic and could not conceivably result in any benefit to any of the parties thereto. This observation is concurred in by Mr. Henry S. Manley, counsel for the defendants comprising the Division of Milk Control in this action as set forth in Mr. Manley's letter, marked "Exhibit 2", and attached to the affidavit of Walter J. Seelig, verified the 28th day of May, 1934.

The business methods of the plaintiff herein in selling its milk within New York City involve many separate transactions daily with its individual consumers and so long as the plaintiff shall not obtain a license each such transaction renders the plaintiff and its officers, agents and employees liable to a penalty of $200 and to fines in an equal amount and also renders plaintiff's officers, agents and employees liable to imprisonment and may, as outlined in Mr. Manley's letter herein referred to as "Exhibit 2," attached to Mr. Seelig's affidavit, impair the standing of other milk dealers who may in the course of conducting their respec- [fol. 93] tive businesses deal with the plaintiff herein.

If the plaintiff were to attempt to challenge the validity of the statute and orders complained of by a single violation thereof, it would be forced to suspend its business until there could be a determination of such issue. The plaintiff herein therefore has no adequate remedy other than to proceed by application for an injunction. Such remedy is not open to it in the State courts since under the law of New York a court of that state may not enjoin the enforcement of a criminal statute.

J. Daniel Dougherty.

Sworn to before me this 28th day of May, 1934.
Lucy Schaefer, Notary Public, Queens County.
Queens Co. Clk's No. 1602, Reg. No. 5629. Kings Co. Clk's No. 37, Reg. No. 5194. N. Y. Co. Clk's No. 613, Reg. No. 5S353. Commission expires March 30, 1935.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER J. SEELIG

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Walter J. Seelig, being duly sworn, deposes and says:

1. I am the Treasurer of G. A. F. Seelig, Inc., the plaintiff in the above entitled action, and am authorized to make this affidavit in support of the plaintiff's application for a temporary restraining order and for an interlocutory injunction.

2. I have read the Bill of Complaint in the above entitled cause and know the contents thereof and beg leave to incorporate in this affidavit each and every allegation therein contained, with the same force and effect as if set forth herein at length.

[fol. 95] 3. The plaintiff is a corporation, duly organized and existing under the laws of the State of New York and having its principal office at No. 522 West 29th Street, Borough of Manhattan, City, County and State of New York.

4. The business of the plaintiff consists, among other things, of purchasing, handling and selling fluid milk and cream in and about the State of Vermont and the City of New York. The plaintiff owns and operates a plant for the distribution and sale of milk in the City of New York at the address given above. The plaintiff, in handling approximately 20,000 pounds of milk daily, may be said to be, in comparison with others engaged in the same business in New York, one of the smaller milk dealers. The plaintiff's corporate ownership and control, however, represents a third generation of milkmen engaged in this business and its commercial reputation and financial standing have been without blemish over a very long period of time.

5. The plaintiff, as a milk distributor or dealer, purchases under contract—which contracts are renewed yearly and run from April first of one year to April first of the

next year—the whole output of processed milk of the Seelig Creamery Corporation, located at Fair Haven, State of Vermont. The plaintiff likewise, under similar annual contracts, purchases part of its supply of milk from other creameries located at Fair Haven, Vermont. All milk handled by the plaintiff is purchased from creameries located in Fair Haven, Vermont, and is all purchased f. o. b., Fair Haven, Vermont, and title thereto passes to it at that point. The present existing contracts between plaintiff and the creameries, from which it gets its supply, do not expire [fol. 96] until March 31st, 1935. The plaintiff has continually for many years purchased milk from the Fair Haven, Vermont, milk shed, making such purchases from creameries established at Fair Haven for many years. Fair Haven, Vermont, which is a well-known Milk Shed, with a particularly high quality of milk, has always served as plaintiff's source of supply, with New York City its market for the disposal of its milk and cream. It cannot properly be contended, in view of this long-continued method of doing business, that the plaintiff went outside of the boundaries of New York State to seek an alleged cheaper market for the purchase of its milk supply, since the enactment of Articles 21 and 21-A and 25 of the Agriculture and Markets Law of the State of New York.

6. Seelig Creamery Corporation, hereinabove mentioned, is a corporation organized under the laws of the State of New York, but does no business whatsoever within the boundaries of New York State, all of its operations being conducted in the State of Vermont. It owns and operates a creamery for the processing of milk at Fair Haven, Vermont. Said Seelig Creamery Corporation is not itself a producer of milk, but buys from the farmers of that section all the milk offered to it. After pasteurizing or otherwise processing such milk, the same is loaded on railroad cars, f. o. b. Fair Haven, for shipment to the plaintiff. Title to the milk passes to the plaintiff at Fair Haven, Vermont, upon loading in railroad cars at that point. The same situation exists as to the other creameries located at Fair Haven, from whom the plaintiff buys a small part of its supply of milk.

7. The plaintiff is wholly and solely a milk dealer within the customary and well-understood meaning of that term

in the milk business. It has no contact whatsoever with the [fol. 97] farmer or the producers of the milk and in marketing its milk within the City of New York sells chiefly in what is known as "can lots," as distinguished from sales of bottled milk. It finds its customers for the sale of its milk in New York City among the hotels, restaurants, hospitals and similar institutions.

8. The provisions of sub-section 4 of Section 258-m of the Agriculture and Markets Law, quoted in paragraph 20 of the Bill of Complaint herein, are arbitrary, unreasonable, oppressive and discriminatory and have no relation to the protection of public health or public welfare and the plaintiff has been informed by his counsel, John J. O'Connor, and verily believes, that the provisions of this section are unconstitutional, illegal and void and are in violation of Section 8 of Article 1 and of the Fourteenth Amendment to the Constitution of the United States, in that they deprive the plaintiff of its property without due process of law and attempt to regulate commerce between the States and are an arbitrary interference with the freedom of contract.

9. On or about April 24, 1934, the plaintiff received from the Commissioner of Agriculture and Markets the application blank required by him to be filed in his office as a prerequisite to the issuance of the necessary license to the plaintiff so that the plaintiff might carry on its business as a milk dealer. On advice of its counsel, the plaintiff prepared and submitted to the said Commissioner its application for a license, together with the requisite fee in payment for the same. On or about May 8, 1934, the defendants Charles H. Baldwin and Kenneth F. Fee, through their associate counsel, Robert G. Blabey, Esq., delivered to the said counsel for the plaintiff a letter, a copy of which is hereto annexed and marked "Exhibit 1" and made a part [fol. 98] hereof. The reason for the rejection of plaintiff's application for a license was, as stated in Mr. Blabey's letter, its qualified answer to question number 37 on the said application form. Question number 37 reads as follows:

"Do you agree not to sell within New York State, after it has come to rest within the State, milk or cream purchased from producers without the State, at a price lower than that required to be paid producers for milk or cream

produced within the State, purchased under similar conditions?"

The plaintiff answer this question:

"Yes, if and when it shall be determined by the courts that the Commissioner has power and authority to compel such payment to producers outside the State of New York."

There were two reasons for making this so-called "qualified" answer to question number 37 of the license application, the first being that there is now pending in the Supreme Court of the State of New York, Albany County, an action between the plaintiff herein and some of the defendants who at that time constituted what was known as the "Milk Control Board," and second, because of plaintiff's contention that the section of the Agriculture and Markets Law upon which said question number 37 is apparently based is invalid and unconstitutional. The matter of the New York Court action is set forth in full in the affidavit of plaintiff's counsel, submitted herewith.

10. With the rejection of plaintiff's application for a milk dealer's license, plaintiff was faced with two possible alternatives: (1) that it could violate the provisions of the statute and orders made thereunder regarding the pur- [fol. 99] chase of milk in Vermont, or (2) that it could attempt to continue to operate as a milk dealer in the City of New York without a license as required by the statute of New York. Each of these alternatives presents to the plaintiff the certain prospect of immediate and irreparable loss, damage and injury, and subjects it to prosecution under the penal features of the Agriculture and Markets Law.

11. This left the plaintiff with apparently only one course of action, namely, to commence an action to determine the constitutionality and validity of the provisions of the statute and orders made thereunder regarding the price to be paid to producers for milk imported from Vermont. This course of action is suggested in a letter addressed to counsel for the plaintiff by Henry S. Manley, Esq., counsel for those defendants herein comprising the Division of Milk

Control. A copy of said letter is annexed hereto, marked "Exhibit 2" and made a part hereof.

12. The commencement of an action to determine the constitutionality and validity of the provisions of the statute, however, affords no protection to the plaintiff until such issue of validity shall be decided by this court unless a temporary restraining order shall issue out of this court, enjoining and restraining defendants in the manner prayed for in the Bill of Complaint herein. The need and necessity for such a restraining order is brought home very forcibly to the plaintiff by the contents of said letter of Henry S. Manley, Esq., referred to hereinbefore as "Exhibit 2".

Wherefore deponent respectfully prays that, pending the hearing and determination of the application for an interlocutory injunction, the plaintiff have the protection of [fol. 100] a temporary restraining order, and that upon said hearing the interlocutory injunction prayed for in said complaint be granted.

Walter J. Seelig.

Sworn to before me this 28th day of May, 1934. Lucy Schaefer, Notary Public, Queens County. Queens Co. Clk's No. 1602, Reg. No. 5629. Kings Co. Clk's No. 37, Reg. No. 5194. N. Y. Co. Clk's No. 613, Reg. No. 5S353. Commission expires March 30, 1935.

[fol. 101] EXHIBIT 1 TO AFFIDAVIT

State of New York

Department of Agriculture and Markets

Albany

Charles H. Baldwin, Commissioner,
Henry S. Manley, Counsel.

May 8, 1934.

Honorable John J. O'Connor, 2 Lafayette Street, New York, N. Y.

In re G. A. F. Seelig, Inc.

Attention of J. D. Dougherty, Esq.

DEAR SIR:

This Department is today in receipt of the application of your client, G. A. F. Seelig, Inc., for a milk dealer's li-

cense pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934) for the license year ending March 31, 1935, together with the check of that corporation dated May 5, 1934, payable to the order of the "New York State Milk Control Board" in the sum of $250.00 and drawn on the National City Bank of New York, Chelsea Branch.

Upon an examination of the application, I find that in answer to the question "Do you agree not to sell within New York State after it has come to rest within the state, milk or cream purchased from producers without the state at a price lower than that required to be paid producers for milk or cream produced within the state purchased under similar conditions?" (being question 37 therein), there is attached a typewritten rider which bears the answer: "Yes, [fol. 102] if and when it shall be determined by the courts that the Commissioner has power and authority to compel such payments to producers outside the State of New York."

I am certain you must realize that we appreciate the fact that your client cannot very well carry on its business without a license, particularly in view of the first two sentences of Section 257 of the Law. Having sworn to uphold the Constitution we have no wish to withhold a license for any reason which is not constitutionally valid, and neither have we any desire that your client procure a license by waiver of any constitutional right. Nevertheless if your client is not willing to unqualifiedly agree to bring itself in harmony with the provisions of the Law and the official orders of the Division of Milk Control with respect to question #37 hereinabove mentioned, no license will be granted to it, and we do not see our way clear to relieve it from that embarrassment relative to its application.

I am, therefore, herewith returning to you by registered mail the $250.00 check submitted with the application and I beg to advise you that if your client should continue in the business of buying milk from producers or others or selling or distributing milk without the required license as provided in said Article 21 of the Agriculture and Markets Law, it must assume all the risks involved.

Very truly yours, (Signed) Robert G. Blabey, Assistant Counsel.

RGB:RH.
Encl.

[fol. 103] EXHIBIT 2 to AFFIDAVIT

State of New York

Department of Agriculture and Markets

Albany

Charles H. Baldwin, Commissioner,
Henry S. Manley, Counsel.

May 21, 1934.

Hon. John J. O'Connor, 2 Lafayette Street, New York City, N. Y.

Att. J. D. Dougherty, Esq.

DEAR SIR:

I am informed that G. A. F. Seelig, Inc., has not yet filed an application in proper form under the Milk Control Law, and hence no license has been issued to it. Mr. Blabey's letter of May 8th correctly states our position about this matter and the remedy which is open to your client. If your client wishes to try out the constitutionality of the provisions of the Milk Control Law which forbid the sale in this State of milk purchased from producers in other states at prices less than those established by the Milk Control Board, its appropriate course would seem to be to seek an injunction. This is the method by which Borden's Farm Products Company is now presenting its belief that the "unadvertised differential" provision is unconstitutional. It is a more satisfactory way of presenting our issue than by presenting it on for a hearing before Judge Hiscock, which might involve the issue of constitutional law in questions of fact, and which would certainly take a long time to bring it up through the various appellate courts.

[fols. 104 & 105] Unless your client takes some definite action within the next few days, we must call to the attention of all persons selling to it and all persons buying from it the fact that it is without license, and the fact that under §257 they are jeopardizing their own license by in any way dealing with your client.

Yours very truly, (Signed) Henry S. Manley,
Counsel.

HSM:AR.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon reading the bill of complaint, verified May 28th, 1934, on file in the above entitled action, and the affidavits of Walter J. Seelig, and J. Daniel Dougherty, both sworn to on May 28th, 1934, and upon the motion of John J. O'Connor, solicitor for the plaintiff, for an order requiring the defendants herein to show cause, if any they have, why they should not be enjoined and restrained during the pendency of this action and until the determination thereof from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, pursuant to any of the provisions of the Agriculture and Markets Law of the State of New York, [fol. 107] any action, suit or proceeding at law or in equity or any criminal action or proceeding:

(a) Against the plaintiff, or any of the officers, agents or employees thereof, by reason of the plaintiff selling or attempting to sell, within the State of New York, milk or cream purchased from producers without the State of New York, at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions;

(b) Against any other person, firm, corporation or association, or any of the officers, agents or employees thereof, or from revoking any license required by Article 21 of said Agriculture and Markets Law to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased from producers without the State of New York at a price lower than that required to be paid producers for milk or cream produced within the State, purchased under similar conditions;

(c) Against the plaintiff or any officer, agent or employee thereof, by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the license required by Article 21 of said Agri-

culture and Markets Law, or against any other person, firm, corporation or association, or any officer, agent, or employee thereof, or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association, by reason of such person, firm, corporation or association purchasing from or selling to the plaintiff milk or cream purchased from producers without [fol. 108] the State of New York at a price lower than that required to be paid producers within the State purchased under similar conditions, or in any way dealing in or handling milk of the plaintiff, although the plaintiff shall not have obtained the license required by Article 21 of said Agriculture and Markets Law, provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the license provided for by Article 21 of the Agriculture and Markets Law other than (1) by having refused to agree in writing, on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or before said date not to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions, or (2) by the sale to or the purchase from said plaintiff by any person, firm, corporation or association of any such milk purchased by plaintiff from producers without the State of New York at a price lower than that required to be paid producers for milk produced within the State under similar conditions; and why the plaintiff should not have such other and further relief as to the Court may seem just and equitable in the premises;

And it further appearing from the verified bill of complaint filed herein, and the said affidavit of Walter J. Seelig, that this is a proceeding to restrain the above named defendants, and each of them, in their respective official capacities, from doing or causing or permitting to be done, directly or indirectly, any of the acts or things hereinabove [fol. 109] set forth; and an interlocutory injunction being prayed for herein;

And this motion being filed pursuant to the provisions of Sections 380, 381 and 382 of Title 28, United States Code

(Judicial Code, Section 266, amended) for the issuance of a temporary restraining order upon the grounds set forth in the bill of complaint and the said affidavit of Walter J. Seelig, to prevent immediate and irreparable injury, loss and damage which would otherwise result to the plaintiff before the hearing and determination of the application for interlocutory injunction herein may be had, or notice thereof be served, because the defendants, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control of the Department of Agriculture and Markets, have notified the plaintiff that they will refuse to grant to the plaintiff the license which plaintiff is required to obtain to conduct its business on or after May 1, 1934, as a milk dealer pursuant to the provisions of Section 258 of Article 21 of the Agriculture and Markets Law of the State of New York, unless the plaintiff shall, on or before April 30, 1934, have agreed in writing to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular unless the plaintiff shall agree in writing not to sell within the State of New York, after it has come to rest within said State, milk or cream purchased from producers without the State at a price lower than that required to be paid to producers for milk or cream produced within the State under similar conditions; and also because the said defendants have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets [fol. 110] Law if the plaintiff shall, without having first obtained the said required license, on or before April 30, 1934, continue its business as a milk dealer on or after May 1, 1934; and also because the said defendants have threatened to invoke against the plaintiff the remedies provided in the said Agriculture and Markets Law if the plaintiff shall sell or attempt to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid to producers for milk or cream produced within the State under similar conditions; and also because, if the plaintiff complies with and obeys the provisions of the said Agriculture and Markets Law and the said rules and orders promulgated by the said Commissioner the plaintiff's contracts with the creameries from which it obtains its milk will be abrogated and breached and

its entire business existence threatened with extinction; and the plaintiff further making its application to this Court for a hearing in this cause for an interlocutory injunction in accordance with the said Sections 380, 381 and 382 before three judges, one of whom at least shall be a Circuit Judge of the United States, as provided in the said Section 380, Now, therefore this Court being fully advised, it is

Ordered that the application for such interlocutory injunction be heard on the 8th day of June, 1934, at 10:30 o'clock in the forenoon, in Room 235, Old Post Office Building, Borough of Manhattan, City of New York, State of New York, before three judges, as provided in the said Section 380; and it is further

Ordered that the defendants, and each of them, in their respective official capacities, be and they hereby are restrained [fol. 111] until the hearing and determination of the application of the plaintiff for its interlocutory injunction herein from bringing or prosecuting or attempting to bring or to prosecute, directly or indirectly, or causing to be brought or prosecuted, directly or indirectly, any action, suit or proceeding at law or in equity or any criminal action or proceeding against the plaintiff or any officer, agent or employee thereof by reason of the plaintiff continuing on or after May 1, 1934, its business as a milk dealer without having first obtained the license required by Article 21 of the said Agriculture and Markets Law or against any other person, firm, corporation or association or any officer, agent or employee thereof or from revoking any license required by said Article 21 to be obtained and held by any such person, firm, corporation or association by reason of such person, firm, corporation or association purchasing milk from or selling milk to the plaintiff or in any way dealing in or handling milk of the plaintiff although the plaintiff shall not have obtained the license required by Article 21 of the said Agriculture and Markets Law; Provided, however, that the plaintiff shall not have taken any action or omitted to take any action constituting grounds for refusal or revocation of the licenses provided for by Article 21 of said Agriculture and Markets Law other than by refusing to agree in writing on or before April 30, 1934, to comply with and obey the provisions of the said Agriculture and Markets Law and the rules and orders promulgated by the said Commissioner, and in particular by refusing to agree in writing on or be-

fore said date not to sell within the State of New York milk or cream purchased from producers without the State at a price lower than that required to be paid to producers for milk or cream produced within the State under similar conditions.

[fol. 112] And it is further ordered that the plaintiff file a bond conditioned as required by law in the sum of $2,000 for the payment of all damages which may accrue by virtue of the issuance of this temporary restraining order;

And it is further ordered that this order shall be in full force and effect and shall be obligatory and binding upon the defendants, and each of them, and all persons acting by, through or under them, upon the service of a copy thereof upon them or upon their solicitor or solicitors of record in this cause;

And it is further ordered that a copy of the bill of complaint herein, a copy of the said affidavit of Walter J. Seelig and a copy of this order be served upon Honorable Herbert H. Lehman, Governor of the State of New York, by mail, on or before the 4th day of June, 1934.

This order, signed at New York on the 31st day of May, 1934, at 4:45 o'clock P. M.

Robert P. Patterson, United States District Judge.

[fol. 113] IN UNITED STATES DISTRICT COURT

[Title Omitted]

AFFIDAVIT OF KENNETH F. FEE

UNITED STATES OF AMERICA,
State of New York,
Northern District:

Kenneth F. Fee, being duly sworn, deposes and says: I am a defendant herein, and from official records of the Department, testimony by Walter J. Seelig and other competent sources I allege on information and belief the following facts:

Seelig Creamery Corporation is a domestic corporation of the State of New York. Its treasurer and sole stockholder is Walter J. Seelig. Its business address is 522 West 29th Street, New York City. It owns and operates a milk

receiving station or plant at Fair Haven, Vermont. About 450 cans of milk are received there daily from about 125 farmers. All of this milk goes to New York City by rail, in 40 quart cans, some in the form of milk and some in the form of cream. Usually the milk is pasteurized at the Fair Haven plant.

[fol. 114] G. A. F. Seelig, Inc., also is a domestic corporation, and its business address is the same given for Seelig Creamery Corporation. It has outstanding 400 shares of common stock and no preferred. Walter J. Seelig is treasurer and owns 250 shares. Gustav R. Seelig is secretary and owns 150 shares. The president, G. A. F. Seelig, owns no stock. G. A. F. Seelig, Inc., buys no milk directly from producers. It obtains its principal supply of milk from Seelig Creamery Corporation. Although it receives a comparatively small amount of milk and cream from other dealers, including some Grade A milk, those transactions will be ignored for purposes of this description of the business.

A copy of a contract dated March 20, 1933, between the two corporations is annexed hereto and made a part hereof. This contract expired March 31, 1934, but from allegations of the petitioner it may be inferred that a somewhat similar contract was entered into for the following twelve months. No copy of the present contract, if any there is, can be found in the office of the New York City Health Department.

The building at 522 West 29th Street, New York City, used as an office address by both corporations, is a one-story brick milk distributing plant, with a partial second story used for office space, and it is leased by G. A. F. Seelig, Inc., from another corporation. G. A. F. Seelig, Inc., sells milk and cream in New York City to hotels, restaurants, clubs, hospitals and stores. Most of this milk and cream is delivered to customers in 40 quart cans, although about 10% is in bottles.

The milk and cream, pasteurized and in cans owned by G. A. F. Seelig, Inc., is loaded into railway cars at Fair Haven, Vermont, consigned to G. A. F. Seelig, Inc., at New York City. The daily shipment is somewhat over 200 cans of milk and about 20 cans of cream, which makes about a carload, and is shipped each day as a carload lot. Upon arrival in New York City the car is opened, some cans are taken upon trucks of G. A. F. Seelig, Inc., to the

[fol. 115] customers, and some are taken to the 29th Street plant and either called for by customers or sent out in trucks of G. A. F. Seelig, Inc., for delivery to customers. The corporation has no bottling facilities of its own, but has some bottling done for it in New York City by another milk dealer.

On May 12, effective May 16, by an order known as Official Order Number 17, the Milk Control Board established certain minimum prices to be paid by milk dealers to producers for milk. This order was subsequently amended by Official Order Number 19 (see Bill of Complaint, pages 44-55), Official Order Number 28, Official Order Number 32 (effective July 1), by Official Order Number 34 (effective July 21), by Office Order Number 41 (effective September 18), by Official Order Number 43 (effective October 16, 1933), and by Official Order Number 58 (effective February 16, 1934). Each of these orders established prices in accordance with the "classified price plan", and under each of them the price for Class 1 milk, or milk used for fluid milk, was highest. From May 16 to July 20, inclusive, the price for a hundredweight of milk testing 3.5 percent butterfat, delivered at a plant 201-210 miles from New York City was $1.88, and from July 20 until February 16 the corresponding price was $2.30½. Such prices were subject to a minus differential, if milk was delivered to a plant more than 200 miles from New York City for utilization there, and Fair Haven is more than 200 miles from New York City. Thus, for 3.5% milk delivered at Fair Haven during the above mentioned period a freight differential of 2c would be subtracted from these prices.

To safeguard and make effectual the provisions in the law and in the orders of the Board that milk shall be purchased at certain minimum prices paid by consumers and reflected back in payments to producers it was found necessary to exercise further the price powers of the Milk Control Board and provide that intermediate transactions be at prices appropriately related to the price required to be [fol. 116] paid to producers. It was found by the Board as a matter of experience that certain dealer-to-dealer transactions took place at lower price levels than those established by the orders of the Board, frequently at a price established by a contract antedating the activities of the Board and fixing the price at the Sheffield or some other blended price plus a certain price per hundred-weight to

cover country plant handling costs, and that such transactions exposed each dealer involved to a strong temptation to violate the price orders of the Board. In the case of the dealer buying from producers and selling to another dealer at a lower price than the price level established by the Board for payments to producers, there was obvious danger that the dealer either would become bankrupt or would find some device to pay the producers at a lower rate. In the case of the dealer buying from a dealer at a lower rate than his competitors could buy there was danger that he would pursue the advantage by cutting prices to obtain additional business for the resale of such milk. The realization of each danger was observed in several cases, which led the Board, on June 30, effective July 1, to make Official Order Number 33. (See Bill of Complaint, page 56). This order, in substance, forbids a dealer-to-dealer sale at any price below the price established to be paid to producers plus costs of handling, transporting and processing the milk to the place and condition involved in such sale.

As applied to G. A. F. Seelig, Inc., Official Order Number 33 forbade it to buy milk from Seelig Creamery Corporation, for Class 1 utilization in New York City, at a price less than the applicable Class 1 price fixed by the orders above referred to, minus 2¢ per hundredweight in the case of milk delivered at Fair Haven, plus a country plant handling charge to be determined at the actual cost of handling such milk. The order had a similar effect as to Class 2-A milk. All the milk handled by Seelig Creamery Corporation and G. A. F. Seelig, Inc., is so used in New York City as to be either Class 1 or Class 2-A milk, more [fol. 117] than half of it falling into Class 1.

All during the period for which the orders mentioned were effective Seelig Creamery Corporation continued to deliver to G. A. F. Seelig, Inc., and it in turn continued to sell in New York City, after it had come to rest there, quantities of milk averaging considerably more than 20,000 pounds daily for which the producers at Fair Haven were paid blended prices much lower than those which should have been paid based on utilization in accordance with the Board's orders. A schedule hereto annexed shows the differences involved.

G. A. F. Seelig, Inc., does not object to paying Seelig Creamery Corporation the amounts required to comply with Official Order Number 33 and the other orders mentioned

above; at least it did comply with them by an additional payment in November 1933 after its non-compliance was called to its attention by suit. Apparently its unwillingness relates entirely to payments from Seelig Creamery Corporation to producers, and the two corporations insist upon the right of Selling in New York City, after it has come to rest there, milk purchased from Vermont producers at prices less than must be paid by competitors buying from New York State producers. The result will be, if that position has constitutional support, either that G. A. F. Seelig, Inc., can compete for business in New York City at a price lower than its competitors can afford to sell (and incidentally involving a violation of certain orders) or that the Seelig interests, through one or the other of the corporations operated as part of a common plan, will derive at the expense of Vermont producers a profit in excess of any that can be obtained by dealers handling New York State milk. In either case there is entailed the eventual destruction of the legislative plan embodied in the Milk Control Law. Producers within New York State, for twelve months [fol. 118] and more forbidden to compete on a low price basis for the milk markets of their State, are being subjected to an unfair price competition by producers without the State, and such competition threatens, if continued and others are encouraged to join therein, to break down the minimum prices established to be paid to the producers within New York State.

Approximately 70 percent of the milk and cream marketed and consumed in the New York City market is produced in New York State and approximately 30 per cent comes from other states. The quantities and origins of such milk and cream for April 1934 (the most recent month for which the report of the U. S. Dept. of Ag. is at hand) appear by a schedule hereto annexed.

Kenneth F. Fee.

Sworn to before me this 7th day of June, 1934.
Mary E. McAuliffe, Notary Public.

[fol. 119] EXHIBIT TO AFFIDAVIT

Memorandum of agreement made this 20th day of March 1933 by and between the Seelig Creamery Corporation, of

522 West 29th Street, Borough of Manhattan, City of New York, hereinafter called the Seller, and G. A. F. Seelig, Inc., of 522 West 29th Street, Borough of Manhattan, City of New York, hereinafter called the Buyer, witnesseth:

That in consideration of the covenants and agreements of each other herein contained each of the parties hereto agree with the other as follows:

1. That this agreement is for a period from April 1st, 1933, to and including March 31st, 1934.

2. The Buyer agrees to buy and the Seller agrees to sell daily shipments of milk and cream amounting to the entire output of the Seelig Creamery Corporation plant owned by the Seller, at Fair Haven, Vermont.

3. The price of milk is to be based on the price of the Sheffield Farms Company, New York City, returned to their producers in the basic zone of the New York Milk Shed, for one-hundred pounds of milk containing 3% butterfat, plus handling charges of 40¢ per can of forty quarts, and four cents for each one-tenth of one percent above 3% butterfat.

4. In the event the output of milk of the Seller exceeds the requirements of the Buyer, the Buyer shall have the option of receiving shipments of light cream and/or heavy cream testing 20% and 40% respectively for such excess of milk produced by the Seller, said light cream and/or heavy cream to be priced proportionately to the current price of milk on the Sheffield basis referred to in paragraph #3 above.

[fol. 120] 5. Payments on this agreement are to be made by the Buyer semi-monthly.

6. The Seller agrees that all products are to be up to the standards of the New York Board of Health requirements, and such products to be legal for sale in the New York City market.

7. It is further understood and agreed that the Buyer shall keep, at all times, sufficient cans at the shipping plant at Fair Haven, Vermont, to take care of the daily shipments.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

Seelig Creamery Corporation, by W. J. Seelig, Treasurer. Witness: B. Ackerman. G. A. F. Seelig, Inc., by G. A. F. Seelig, Pres. Witness: J. Jackson.

[fol. 120½] [Endorsed:] In the District Court of the United States for the Southern District of New York. G. A. F. Seelig, Inc., Plaintiff, against Charles H. Baldwin, as Commisioner of Agriculture and Markets of the State of New York, and others, Defendants. In Equity No. 78-174. Answering Affidavit. John J. Bennett, Jr., Attorney General; Henry S. Manley, Counsel to the Milk Control Division, Solicitors for Defendants.

[fol. 121] EXHIBIT TO AFFIDAVIT

United States Department of Agriculture

Bureau of Agricultural Economics

Market News Service

Total Receipts at New York and Metropolitan Area, Rail and Truck, April, 1934

State of Origin	Milk—40 Qt. Units			Cream—40 Qt. Units		
	Rail	Truck	Total	Rail	Truck	Total
N. Y.	1,204,401	498,479	1,702,880	79,704	19,238	98942
N. J.	30,902	256,844	287,746	778	1,276	2,054
Pa.	303,218	140,685	443,903	13,425	4,208	17,633
Vt.	95,607	10,777	106,384	7,134	659	7,793
Conn.	16,581	.....	16,581	462	.....	462
Md.	12,709	.....	12,709	.....	.....	.....
Del.	3,170	.....	3,170	25	.....	25
Ohio	5	.....	5	2,787	.....	2,787
Ind.	.....	.....	.....	690	.....	690
Mich.	.....	.....	.....	200	.....	200
Mass.	.....	11,493	11,493	.....	246	246
Totals	1,666,593	918,278	2,584,871	105,205	25,627	130,832

[fol. 122]

EXHIBIT TO AFFIDAVIT

Seelig Creamery Corporation

Period	Lbs. Rec'd	Test	Payments		Board Minimum		Under Payment	
			Rate	Amount	Rate	Amount	Rate	Amount
May 16–31, 1933	581984	3.734	1.394	8110.53	1.702	9908.21	.308	1797.68
June	1113771	3.642	1.417	15781.60	1.656	18444.05	.239	2662.45
July1–20	627607	3.6547	1.552	9739.71	1.808	11347.13	.256	1607.42
July 21–31	296639	3.6878	1.825	5414.01	2.242	6650.65	.417	1236.64
August	803766	3.832	2.033	16339.75	2.286	18372.72	2.253	2032.97
September	850993	3.9274	1.951	16602.57	2.303	19598.37	.352	2995.80
October	917134	4.047	1.959	17965.10	2.345	21506.79	.386	3541.69
November	711460	4.06	2.077	14779.75	2.484	17672.67	.407	2892.92
December	706829	4.04	2.017	14259.43	2.501	17677.79	.484	3418.36
January, 1934	720237	3.975	1.94	13972.64	2.475	17823.35	.535	3850.71
February	612263	3.9416	1.926	11796.52	2.387	14620.80	.461	2824.28
March	748763	3.799	1.620	12128.34	2.216	16336.96	.596	4408.62
								33,269.54

[fol. 123] In United States District Court, Southern District of New York

G. A. F. Seelig, Plaintiff,

against

Charles H. Baldwin, Commissioner, and others, Defendants

Before L. Hand, Circuit Judge, and Bondy and Patterson, District Judges

On return to an order to show cause why the defendants should not be enjoined from refusing to grant the plaintiff a license to sell milk in the State of New York under the Agriculture and Markets Law; and from prosecuting it for selling milk without a license. On motion of the defendants to dismiss the bill.

J. J. O'Connor, for the Plaintiff.
Henry S. Manley and Henry Epstein, for the Defendants.

Opinion—Filed Aug. 2, 1934

L. Hand, Circuit Judge:

This case comes up before a special court constituted under Section 380, of Title 28, of the U. S. Code, to enjoin the defendants from enforcing Section 258 (m) (4) of Article 21-a of the Agriculture & Markets Law of the State of New York, enacted April 1, 1934, and an order of the Milk Control Board of the State issued July 1, 1933, under an earlier act of the same purport. The plaintiff is a milk dealer who buys its supplies in Fairhaven, Vermont, principally from the Seelig Creamery Company. The majority of the shares of the two companies are owned by the same persons, although the companies themselves are separate. The creamery buys its milk of Vermont farmers, and sells it to the plaintiff in Vermont in cans, which the plaintiff ships by rail to the City of New York. Some of the milk [fol. 124] the plaintiff sells direct in the cans delivered to it by the creamery company; some it bottles and distributes to its customers in that form. The State of New York has

created a system of price control over the sale of milk, in pursuance of which it has provided that, so far as such a prohibition is constitutionally lawful, no milk shall be sold within the State which is bought outside at prices less than those fixed for the purchase of milk from farmers within the State. This is Section 258 (m) (4) and is quoted in the margin.* Under an identical section, viz., Section 312 (g) of Article 25, enacted in the year 1933, the Milk Control Board of New York on July 1, 1933, passed an order construing this language by forbidding the continuous purchase of milk outside the State, followed by its use within the State, if the milk was bought for less than the minimum price fixed for purchase within the State. This order is likewise quoted in the margin;† and remained in force after the passage of the law of 1934. The defendant [fol. 125] Baldwin is Commissioner of Agriculture & Markets, and the successor in function to the Milk Control Board; he has refused to issue a license to the plaintiff to

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* It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced ouside of the state becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State purchased under similar conditions, shall be unlawful.

† Any continuous and regular purchase or sale or delivery or receipt of milk passing to a milk dealer at any place and available for utilization as fluid milk and/or cream within New York State, followed by such utilization in one or more instances, where the price involved in such purchase or sale or delivery or receipt is less than the sum of the minimum price established to be paid to producers for such milk plus actual costs of transporting and handling and processing such milk to the place and to the conditions involved in such purchase or sale or delivery or receipt, hereby is forbidden.

sell milk in New York, unless it agrees to obey all orders of the former board and of himself, including that just mentioned. The plaintiff has refused, asserting among other things that the act and the order in conjunction are an unconstitutional interference with interstate commerce. It now moves for an injunction pendente lite, to which the defendants counter with a motion to dismiss the bill. The defendants, other than Baldwin, are the Director of the Division of Milk Control; the Attorney General and the District Attorney of the County of New York. The first is alleged to be acting in conjunction with the commissioner, and the others to be threatening to prosecute the defendant for selling milk without a license.

The jurisdiction of this court is conceded and indubitable, except that a question is raised whether the constitutionality of the act is at stake as contrasted with its interpretation. The argument is, that since it expressly confines its ambit to such subject matter as is constitutionally within the State's power, there cannot be a conflict between it and the Constitution; ex vi termini the legislature stops exactly where, if it went further, its action would be forbidden. We should doubt whether this could avoid the issue of constitutionality; since the act professes to go as far as it can, its interpretation involves the meaning of the Constitution. Be that as it may, such a statute, strictly speaking, enacts nothing but a hypothesis, and is necessarily brutum fulmen until some official supplies the condition by enforcing it in a concrete instance. When as here he does so by a regulation, the constitutionality of his act must be passed on by a court organized under Section 380 of Title 28. Then at any rate the issue becomes one of the constitutionality of the regulation. We proceed to the merits.

The doctrine was not a priori inevitable that, even though Congress had not exercised its paramount power, the States might not in the management of their internal affairs impinge upon interstate commerce. Cf. License Cases, 5 How. 504. Section 8 of Article I, merely conferred [fol. 126] powers on Congress; it fo-ad nothing; it was section 10 alone that took away the States' powers, and though part of it did indeed deal with the same subject-matter, it was very limited in scope. It might have been held that this was the measure of the States' incapacity

until Congress chose to act. But the contrary is now so thoroughly established as to need little citation, and the question is always whether the State has "directly" regulated interstate commerce. The Minnesota Rate Cases, 230 U. S. 352, 396; Missouri v. Kansas Gas Co., 265 U. S. 298, 307. Section 258 (m) (4) does not forbid the importation of milk into New York from outside; it merely prevents its sale when it gets there, unless it has been bought at the price which must be paid for similar milk in New York. Conceivably such a regulation might have been held to touch interstate commerce only "indirectly," and thus to be lawful until Congress stepped in. But again the opposite view prevailed; it is a "direct" restraint to forbid sale after the goods arrive, provided they are still a part of interstate commerce. Brown v. Maryland, 12 Wheat. 419, 447; Leisy v. Hardin, 135 U. S. 100, 111; Schollenberger v. Pennsylvania, 171 U. S. 1, 22; Savage v. Jones, 225 U. S. 501, 520; Missouri v. Kansas Gas Co., supra, (265 U. S. 298). Moreover, although for fiscal purposes the doctrine of the unbroken package no longer fixes the term of interstate commerce, (Sonneborn Bros. v. Cureton, 262 U. S. 506), when the issue is of the state's general municipal power over goods going to, or coming from, another state, we understand that the doctrine of Brown v. Maryland, supra, (12 Wheat. 419), still obtains. Leisy v. Hardin, supra, (135 U. S. 100); Schollenberger v. Pennsylvania, supra, (171 U. S. 1); Austin v. Tennessee, 179 U. S. 342, 348; Price v. Illinois, 238 U. S. 446, 454, 455; Hebe Co. v. Shaw, 248 U. S. 297, 304. Whatever may be thought of so accidental a measure for the distribution of governmental powers, in view of the recent approval of the doctrine, it does not seem to us that an inferior court is free to treat it as open to debate. So far as we are to have a more realistic canon, it must be worked out step by step by the Supreme Court. Indeed in Austin v. Tennessee, supra, that court refused to accept the doctrine with verbal rigidity. Moreover, if the goods do not come in packages at all, there may be a substitute step by which they pass into the domestic stock of goods. Public Service Com. v. [fol. 127] Landon, 249 U. S. 236; Pennsylvania Gas Co. v. Public Service Com., 252 U. S. 18; Missouri v. Kansas Gas Co., supra, (265 U. S. 298). For instance in the case of moving picture films, though not boxed, the critical event is

their exhibition. Mutual Film Corporation v. Ohio Industrial Co., 236 U. S. 230, 241. None of the exceptions need concern us here as to the milk sold by the plaintiff in the original cans; these are bona fide unbroken packages; they are still a part of interstate commerce, and the State has no power to forbid their sale unless by virtue of some excuse, of which more in a moment. As to the bottled milk, the opposite is true; the State may control it at its pleasure; it is part of the mass of its domestic goods; and although in so doing the State in effect fixes the price at which the milk shall be bought elsewhere, the sanction is local, and it is otherwise unobjectionable. Save for her Federal duties, New York might forbid the entry of Vermont milk altogether, if she thought such milk likely to break down her policy of protecting her farmers or of securing a steady supply for her people.

Generally the power of the States has been said to rest solely upon the two questions we have already mentioned; that is, whether the goods are still in interstate commerce and whether the statute "directly" affects it. The accepted theory certainly is that the power does not depend upon the purposes which the state may have in mind, the concept is morphological rather than functional. But there are some decisions which it is very hard to fit into that pattern, which seem to turn not so much upon where the statute intervenes in the economic history of the goods, or how diffuse its effect may be when it does, as upon what is the justification for any intervention at all. One of these is Silz v. Hesterberg, 211 U. S. 31, 43; where the entry of game from elsewhere was prohibited as an incident to the protection of the local game supply. Certainly the act impinged as directly as possible upon the movement of foreign game which entered in its original wrappings; we can see no other explanation than that the purpose justified the power. It is possible to explain Geer v. Connecticut, [fol. 128] 161 U. S. 519, on another theory; that is, that the embargoed game has no yet become separated from the mass of local goods, and that interstate commerce had therefore not commenced. But that was not the ground on which it proceeded, any more than it was the ground of Sligh v. Kirkwood, 237 U. S. 52, which must stand like the game cases as an instance where the purpose excused. Besides, it is not always true that goods must have started

upon their interstate movement, or be even segregated for that purpose, before they enter interstate commerce. Oklahoma v. Kansas Mut. Gas Co., 221 U. S. 229, 255. Lemke v. Farmers Grain Co., 258 U. S. 50, 55, 56; Pennsylvania v. West Virginia, 262 U. S. 553, 598; Foster Packing Co. v. Haydel, 278 U. S. 1. Hall v. Geiger-Jones Co., 242 U. S. 539, 557-559, may indeed be distinguished, because although the court expressly refused to find that the securities had become part of the local mass of goods, it dealt with the statute as an inspection law, like Plumley v. Massachusetts, 155 U. S. 461; Crossman v. Lurman, 191 U. S. 189; Patopsco Guano Co. v. North Carolina, 171 U. S. 345; Savage v. Jones, supra, (225 U. S. 501), and many others. In such cases although the state lays its hand directly upon goods while in interstate commerce, yet if it does so only to determine whether they are sound, or truly marked, or the like, it has that power. The recognition of inspection laws in Section 10, Art. 1 seems to imply as much. It could indeed be argued that as inspection presupposes a standard to which the goods must conform, and power to exclude them if they do not, the State ought to be able to enforce standards that demand no inspection. This is perhaps no more than to argue that the recognition of the validity of inspection laws proves that the States had general powers except as denied in section 10. Be that as it may, inspection laws have historically an ascertainable, if a somewhat vague, meaning; they may be valid merely as an expressed exception, and it is so that they must be regarded unless much else is to be treated as not seriously spoken. Railroad Co. v. Husen, 95 U. S. 465, 473; Brimmer v. Rebman, 138 U. S. 78; Vance v. Vandercook, 170 U. S. 438, 455, 456; Reid v. Colorado, 187 U. S. 137, 151, 152. Foster Packing [fol. 129] Co. v. Haydel, supra, (278 U. S. 1), perhaps depended upon the discrimination which the State was attempting, in which it was like Minnesota v. Barber, 136 U. S. 313. The effort was to secure a monopoly of the shelling of the State's shrimps, just as in Minnesota v. Barber it was to obtain a monopoly of butchering meat. But the discriminatory effect of the law was not pressed, and the decision seems rather to rest upon the fact that unlike Geer v. Connecticut, supra, (161 U. S. 519), the State had relinquished all interest in the shell-fish, and that its

only other possible motive, i. e., to establish an industry, was no excuse.

We do not think that it is necessary to go further than suggest from these cases that the venture on which the State is engaged may at times excuse its interference; that its intervention is not always condemned because it interposes "directly" upon the goods while they are still a part of interstate commerce. Assuming for argument that there may be such instances, the motive in the case at bar will not serve. We do not of course mean that the plan is not commendable in itself, or that the means are not well adapted to the end. Nebbia v. N. Y., 291 U. S. 502, has authoritatively settled the State's power, and it is easy to see how the whole scheme might be imperilled, and conceivably wrecked, unless foreign milk, bought at cut prices, could be kept out of competition with the domestic supply. Furthermore, though a complete exclusion would give even greater security, it might have been open to a charge of unfair discrimination, which cannot be made as it is. The act does not try to circumscribe the "milk-shed" as equal competition defines it; it merely prevents price-cutting throughout its area. So put, there is much to be said for the propriety of the extraterritorial feature, and Congress might well be induced to sanction it as it stands. But that sanction is, we think, essential to its validity. The situation is indeed scarcely distinguishable at all from Schollenberger v. Pennsylvania, supra, (171 U. S. 1), and so far as it is, presents a weaker case for the state's power. In that case the act was unsuccessfully defended as an inspection law, since oleomargarine might easily stimulate real [fol. 130] butter. But it had another side, like the milk here, the substitute was probably in fact prohibited only because it competed with dairymen; and though this was not argued, that was almost certainly because in 1898 the court would have at once rejected it. A fortiori the case at bar is therefore within that decision, for no pretence can here be made that this is an inspection law. Although the section in question may be a reasonable incident to the State's internal economic polity, nevertheless it seeks to protect a local industry by excluding foreign competing goods, and that is exactly the kind of activity against which the commerce clauses are primarily directed. Their occasion was the mutual jealousies and aggressions of the

States, taking form in customs barriers and other economic retaliation. Farrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, p. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, Vol. I, p. 289, 290, Story on the Constitution, Section 259. The implied prohibition in Section 8 is less definite than the express one in section 10, but so far as there may be any exceptions to it, based upon the purposes of the State, they cannot include the exclusion of competing goods because they compete. That at least is forbidden by the genesis of both clauses, and the express content of the second. No matter what the local need, as a nation we are without protective economic barriers between the States, certainly until Congress sees fit to allow them, and it makes no difference that they do not take the form of duties of imposts under Section 10 of Article I. The State's intervention in the case at bar is indeed closely parallel in its result to a customs duty. Such a duty pro tanto secures the market to the local supply through the resulting rise in price; and that is the avowed object of this law; it will allow no foreign milk to enter unless it has already cost enough to make sure that it must compete on equal terms. The Constitution denies to a State that kind of economic sanction, and puts it in the hands of the public authority charged with the national welfare. So far as the act attempts to prevent [fol. 131] the import of milk in cans it is therefore invalid.

The motion to dismiss the bill is denied. An injunction pendente lite will be granted forbidding the defendants to exact from the plaintiff as a condition of granting a license any agreement not to sell milk in cans in New York which has been bought in Vermont at lower prices than those prescribed for the purchase of milk in New York. This opinion will stand as findings of fact and conclusions of law under Equity Rule 70½, unless objection is made.

I concur: Wm. Bondy, Robert P. Patterson, District Judges.

[File endorsement omitted.]

[fol. 132] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUBMISSION OF MOTIONS AND STIPULATION OF FACTS—Filed Nov. 21, 1934

It is hereby stipulated, by and between the attorneys for the respective parties herein, that there be submitted to the Court the application of the plaintiff for a final injunction as prayed in its bill of complaint, and the motion of the defendants to dismiss the bill. For the purpose of this submission the following facts are submitted with the intention that it have the same effect as though proven upon a trial and uncontradicted:

1. The plaintiff, G. A. F. Seelig, Inc., is a domestic corporation of the State of New York, and a resident of the Southern District of that State.

2. The defendant Charles H. Baldwin is the Commissioner of Agriculture and Markets of that State; the defendant Kenneth F. Fee is Director of the Division of Milk Control in the Department of which said Commissioner is the chief executive officer; the defendant John J. Bennett, Jr., is Attorney General of that State; the defendant William C. Dodge is District Attorney of New York County. Each of the above named defendants maintains in the Southern District of New York State an office for transaction of his official business.

[fol. 133] 3. The amount in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

4. The plaintiff is engaged and at all times hereinafter mentioned and for many years prior to April 10, 1933, was continuously engaged in the business of purchasing and handling and selling fluid milk and cream in and about the City of New York, State of New York, said City having a population of over one million inhabitants. The plaintiff has built up a large and extensive business in the said City in the sale of fluid milk, chiefly in can lots, to consumers and to hospitals, grocery stores, hotels, restaurants, soda fountains, dairy products stores and similar mercantile estab-

lishments, and has owned and operated a plant in the Borough of Manhattan, City of New York, for many years, for the distribution and sale of fluid milk and cream in and about the City of New York, in wholesale lots, that is, chiefly in "can lots", as distinguished from bottled milk, as hereinabove stated. The plaintiff, in handling approximately 20,000 pounds of milk daily is, in comparison with others engaged in the same branch of the milk business in New York City, one of the smaller milk dealers.

5. The plaintiff obtains its principal supply of milk from Seelig Creamery Corporation.

6. Seelig Creamery Corporation also is a domestic corporation of the State of New York. It owns and operates a milk receiving station or plant at Fair Haven, Vermont.

7. A copy of a contract dated March 20, 1933, between the plaintiff and Seelig Creamery Corporation is annexed hereto and marked "Exhibit A" and made a part hereof. This contract expired March 31, 1934, but a similar contract for the subsequent twelve months now is in effect.

[fol. 134] 8. Seelig Creamery Corporation buys from certain selected farmers or producers of the milk shed in and about Fair Haven, Vermont, all of the milk offered to it daily. About 450 forty-quart cans of milk are received there daily from about 125 farmers. This milk is pasteurized there (excepting milk which is to be bottled in New York City) and some of it is separated into cream. All of this milk goes to New York City by rail, in forty-quart cans, some in the form of milk and some in the form of cream. Each day the milk and cream, pasteurized and in cans owned by the plaintiff, is loaded into a railway car at Fair Haven, Vermont, consigned to the plaintiff at New York City. The daily shipment is somewhat over 200 cans of milk and about 20 cans of cream, which is shipped each day as a carload lot, F. O. B. Fair Haven, Vermont.

9. In New York City, at 522 West 29th Street, the plaintiff maintains a one-story brick milk distributing plant, with a partial second story used for office space.

10. Upon arrival in New York City of the daily carload of milk from Fair Haven, Vermont, the car is opened, some cans are taken upon the plaintiff's trucks to the customers, and some are taken to the 29th Street plant and either

called for by customers or sent out in plaintiff's trucks for delivery to customers. The sales by the plaintiff of milk and cream are mostly to hotels, restaurants, clubs, hospitals and stores in New York City, and mostly it is delivered in the same forty-quart cans in which it came from Fair Haven, Vermont.

11. About 10% of the milk is bottled in New York City and delivered to customers in bottles. Plaintiff has no pasteurizing and bottling facilities of its own in New York City, and this work is done for it by another milk dealer.

[fol. 135] 12. The business of Seelig Creamery Corporation is conducted under and pursuant to the laws of the State of Vermont as a foreign corporation in that State, licensed to do business in and by that State, and under and pursuant to the laws of Vermont governing the operations of creameries in that State. The operations of Seelig Creamery Corporation are confined wholly to the State of Vermont, and at all times hereinafter mentioned and for many years prior to April 10, 1933, it so conducted its business. The plaintiff and Seelig Creamery Corporation are, and at all times hereinafter mentioned were, wholly separate and distinct corporate entities and neither corporation owns, holds or controls stock in the other.

13. The plaintiff and Seelig Creamery Corporation each uses 522 West 29th Street, New York City, as a business address. The plaintiff has outstanding 400 shares of common stock and no preferred. Walter J. Seelig is treasurer and owns 250 shares. Gustav R. Seelig is secretary and owns 150 shares. The president, G. A. F. Seelig, owns no stock. Walter J. Seelig is treasurer of Seelig Creamery Corporation and its sole stockholder.

14. The plaintiff has duly obtained from the Board of Health of the City of New York all such licenses and permits as are required by the Sanitary Code of the said City or the regulations adopted thereunder for the lawful conduct of the plaintiff's said business, and the plaintiff has duly kept, observed and performed all the provisions of said Sanitary Code and the regulations adopted thereunder.

15. The enactment and language of chapter 158 of New York Laws of 1933, and of chapter 126 of New York Laws of 1934, are stipulated.

[fol. 136] 16. On May 12, 1933, effective May 16, 1933, the Milk Control Board adopted an order known as Official Order No. 17, a full, true and correct copy of which is annexed hereto, and marked "Exhibit B" and made a part hereof. Said order was subsequently amended by Official Order No. 19, Official Order No. 28, Official Order No. 32 (effective July 1, 1933), by Official Order No. 34 (effective July 21, 1933), by Official Order No. 41 (effective September 18, 1933), and by Official Order No. 43 (effective October 16, 1933). Official Order No. 17 (Exhibit B) established minimum prices to be paid by milk dealers to producers for milk in accordance with the "classified price plan," which price plan was and is based upon the ultimate utilization by the dealers of the milk so purchased. The subsequent official orders herein recited made certain amendments to or changes in the prices to be paid by the milk dealer to the producer, but did not materially change the general price structure set up by said Official Order No. 17 (Exhibit B).

17. On or about June 30, 1933, the Milk Control Board adopted an order known as Official Order No. 33, effective July 1, 1933, a full, true and correct copy of which is annexed hereto, marked "Exhibit C" and made a part hereof. Under and by virtue of the said Official Order No. 33 the purchase or sale by or to a milk dealer of fluid milk (followed by the utilization of the same within New York State) at a price less than the sum of the minimum price established by the Milk Control Board to be paid to producers for such milk, irrespective of where such producers might be located, was forbidden.

18. Official Order No. 17 (Exhibit B) and said Official Orders amendatory thereof, and Official Order No. 33, or other orders of similar tendency in each case, continue to be in full force and effect.

[fol. 137] 19. Under Official Order No. 17 and said Official Orders amendatory thereof the price of Class 1 milk, or milk used for fluid milk, was highest. From May 16 to July 20 inclusive of 1933 the price for a hundredweight of milk testing 3.5 per cent butterfat, delivered at a plant 201-210 miles from New York City, was $1.88; and from July 20, 1933, until February 16, 1934, the corresponding price was $2.30½. Such prices were subject to a minus

differential, if milk was delivered to a plant more than 210 miles from New York City for utilization in New York City, and Fair Haven, Vermont, is more than 210 miles from New York City. Thus, for 3.5 per cent milk delivered at Fair Haven during the above mentioned period a freight differential of 2 cents would be subtracted from the prices mentioned above.

20. All during the period for which the orders mentioned above were effective Seelig Creamery Corporation continued to deliver to G. A. F. Seelig, Inc., and it in turn continued to sell in New York City in the manner above described, quantities of milk averaging 20,000 pounds or more daily. For that milk the producers at Fair Haven, Vermont, were paid by Seelig Creamery Corporation prices lower than those which the Milk Control Board claimed should have been paid based upon utilization of the milk in accordance with the Board's orders. A schedule hereto annexed and marked "Exhibit D" and made a part hereof shows the differences involved.

21. Similar differences still continue. The plaintiff asserts and is exercising the right to sell in New York City, in the manner already described, milk purchased by it from Seelig Creamery Corporation and in turn purchased by that corporation from producers in Vermont at prices fixed by agreement between the corporation and producers, quite irrespective of the prices fixed by Official Order No. 17 and similar orders of the defendant Baldwin.

[fol. 138] 22. Approximately 70 per cent of the milk and cream marketed and consumed in the New York City market is produced in New York State and approximately 30 per cent comes from other state-. The quantities and origins of such milk and cream for April 1934, as reported by the United States Department of Agriculture, appear by a schedule hereto annexed and marked "Exhibit E" and made a part hereof. A substantial part of the milk produced in New York State and marketed and consumed in New York City passes through another state on its way to market.

23. Of the milk commerce included within that 30% some is handled in the manner herein described, some (particularly cream) in 40 quart cans transported from country

plants to the New York City market by trucks, some is pasteurized and bottled at the country plants and is shipped from the country plants in cases either by railroad or by truck, and a considerable quantity of milk is transported from country plants to said market in tank trucks, being drawn off into cans and for bottling and distribution upon arrival at said market.

24. As to the sale of milk by the plaintiff to consumers within the State of New York, and chiefly within the City of New York, where it finds its market, the plaintiff has at all times followed and complied with the rules and orders of the Milk Control Board governing such sales and the prices charged for its products.

25. The defendant Baldwin requires as a prerequisite to the granting of licenses required to be obtained by the plaintiff as a milk dealer under chapter 126 of New York Laws of 1934 that the plaintiff agree in writing to comply with and obey the provisions of such statute and the Official Orders promulgated by him. He requires the plaintiff to answer affirmatively the following two questions which appear in the application blank prepared by him:

[fol. 139] "Do you agree not to sell within New York State after it has come to rest within the State, milk or cream purchased from producers, without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?"

"Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced without the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions?"

Unless the plaintiff does so agree and answer those two questions affirmatively the defendant Baldwin will not grant it such a license.

26. The defendants Baldwin and Fee have rejected plaintiff's application for a license and have refused to issue it a license because the plaintiff has refused to so agree and has refused to answer those two questions affirmatively and unconditionally. The application of the plaintiff was in all other respects duly made and unobjectionable.

27. The enactment and language of sections 38 to 41 inclusive of the Agriculture and Markets Law of the State of New York are stipulated.

28. The defendants, in their official capacities, have threatened to invoke against the plaintiff the remedies by civil suits and criminal prosecutions and otherwise provided in those sections, if the plaintiff continues its business as a milk dealer after May 1, 1934, without having first obtained the required license. The penalties so threatened are so numerous and so great that the plaintiff cannot risk them even for the purpose of testing the right which it is asserting herein, and unless the existence of the right is determined in this proceeding it must be surrendered without judicial determination.

[fol. 140] 29. The foregoing stipulation of fact is intended to present as concisely as possible and in an orderly manner the facts stated in the bill of complaint, the two supporting affidavits verified on May 28, 1934, by J. Daniel Dougherty and Walter J. Seelig respectively, and the answering affidavit verified on June 7, 1934, by Kenneth F. Fee. Although this stipulation is intended to be complete in itself, and not to need amplification from those sources, it may receive interpretation therefrom should it appear to be ambiguous in any particular. Failure to copy into this stipulation any allegation of those sources is not intended to reflect upon their correctness and shall not support an inference that this stipulation is to be narrowly interpreted in any particular.

John J. O'Connor, Solicitor for Plaintiff. John J. Bennett, Jr., Attorney General of the State of New York; Henry Epstein, Solicitor General; Henry S. Manley, Counsel to the Department of Agriculture and Markets, Solicitors for the Defendants.

[fol. 141] Exhibit—

A—Contract between Seelig Corps. appears as Exhibit in Fee Affdt.

B—Order #17, printed as Ex. "B" in Bill of Complaint.

C—Order #33, printed as Ex "C" in Bill of Complaint.

D—Table of Underpayments appears as Exhibit in Fee Affdt.

E—Milk shipments to N. Y. C. appears as Exhibit in Fee Affdt.

[File endorsement omitted.]

[fol. 142] In United States District Court, Southern District of New York

In Equity. No. 78-174

G. A. F. Seelig, Inc., Plaintiff,

against

Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and others, Defendants

Final Decree—Filed Nov. 21, 1934

By stipulation of October 31, 1934, the parties hereto have submitted for decision the plaintiff's application for final injunction, opposed by the defendants, and the defendants have submitted for decision their motion to dismiss the bill of complaint, opposed by the plaintiff, and they also have submitted an agreed statement of facts. That agreed statement of facts is hereby adopted as findings of fact for the purposes of the present decision. The issues of law now involved are not substantially different from those which were determined in an opinion written in this case on or about August 2, 1934. Now, therefore it is

Ordered, adjudged and decreed that the defendants Baldwin and Fee be, and they hereby are, finally enjoined from exacting from the plaintiff G. A. F. Seelig, Inc. as a condition of issuing a license to said plaintiff to sell milk, an

agreement not to sell within the State of New York milk brought from another state if such milk was purchased from producers in such other state at a price lower than that [fol. 143] required to be paid for milk produced within New York State and purchased under similar conditions, so far as the selling is by the plaintiff while the milk is in the cans or other original packages in which the milk has been brought by the plaintiff from without the State of New York, and it is

Further ordered, adjudged and decreed that the defendants Bennett and Dodge be, and they hereby are, finally enjoined from prosecuting the plaintiff for selling within the State of New York milk brought from another state because such milk was purchased from producers in such other state at a price lower than that required to be paid for milk produced within New York State and purchased under similar condition, so far as the selling is by the plaintiff while the milk is in the cans or other original packages in which the milk has been brought by the plaintiff from without the State of New York, and it is

Further ordered, adjudged and decreed that the application of the plaintiff for a final injunction against the defendants be, and the same hereby is, denied in all other respects than is heretofore set forth, and it is

Further ordered, adjudged and decreed that the motion of the defendants to dismiss the bill be and the same hereby is denied.

Learned Hand, Circuit Judge; Wm. Bondy, U. S. D. J.; Robert P. Patterson, District Judges.

Dated November 16th, 1934.

[File endorsement omitted.]

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed Dec. 14, 1934

To the District Court of the United States for the Southern District of New York and to the Honorable Judges thereof:

The defendants, Charles H. Baldwin as Commissioner, etc., and Kenneth F. Fee as Director, etc., and John J.

Bennett, Jr., as Attorney General, etc., feel themselves aggrieved by the final decree of this Court entered November 21, 1934, in the office of the Clerk, and they respectfully pray an appeal therefrom to the Supreme Court of the United States.

The defendants assign the following errors in the record and proceedings in the said case:

1. The District Court erred in granting any final injunction herein against exacting from the plaintiff a certain agreement as a condition of issuing to it a license.

2. The District Court erred in granting any final injunction against prosecuting the plaintiff.

[fol. 145] 3. The District Court erred in refusing to dismiss the bill, and in each and every conclusion of law stated in its opinion and leading to the three errors previously assigned.

Because of the errors assigned above the defendants pray for a reversal of the final decree above mentioned. To that end they pray that a transcript of the record may be transmitted forthwith, in duly authenticated form, to the Supreme Court of the United States.

Dated December 11, 1934.

John J. Bennett, Jr., Attorney General; Henry Epstein, Solicitor General; Henry S. Manley, Counsel to the Department of Agriculture and Markets, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 146] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR CROSS-APPEAL AND ASSIGNMENT OF ERRORS—Filed Dec. 14, 1934

To the District Court of the United States for the Southern District of New York and to the Honorable Judges thereof:

The plaintiff, G. A. F. Seelig, Inc., being aggrieved by certain parts of the final decree of this Court entered No-

vember 21, 1934, in the office of the Clerk, respectfully prays an appeal therefrom to the Supreme Court of the United States.

The plaintiff assigns as the errors upon which it will rely that the District Court erred in denying in some respects the application for a final injunction, and erred in each conclusion of law stated in its opinion and leading to such denials.

Because of the errors assigned above, plaintiff prays for a reversal of so much of the final decree as in any way denies the relief prayed for in the Bill of Complaint and prays [fols. 147 & 148] that judgment be rendered in favor of the plaintiff as prayed for in the Bill of Complaint.

Dated December 14, 1934.

John J. O'Connor, Solicitor for Plaintiff.

[File endorsement omitted.]

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL AND CROSS-APPEAL—Filed Dec. 14, 1934

The defendants in the above cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the final decree made in said suit by the District Court and entered in the office of its Clerk on November 21, 1934, and having presented their petition for appeal and assignment of errors; and

The plaintiff having prayed for the allowance of a cross-appeal from part of such final decree and having likewise presented its petition for cross-appeal and assignment of errors; and

The plaintiff and defendants having presented their joint statement as to jurisdiction as required by Rule 12 of the Supreme Court of the United States; it is

Ordered, that the appeal prayed for by the defendants, and the cross-appeal prayed for by the plaintiff, be and the same hereby are allowed; and it is further

Ordered, that the Clerk of the District Court prepare and certify a transcript of the record in this cause and transmit the same to the Supreme Court of the United States so that it shall have the same within forty days from this date; and it is further

[fol. 150] Ordered, that security for costs be, and the same hereby is, dispensed with upon the appeal and the cross-appeal, by consent of the respective solicitors.

Dated December 14, 1934.

Robert P. Patterson, United States District Judge.

The parties hereby consent to the granting of the foregoing order allowing an appeal and cross-appeal without the necessity of filing any security for costs on either side.

John J. O'Connor, Solicitor for Plaintiff; Henry S. Manley, Solicitor for Defendants.

[File endorsement omitted.]

[fol. 151] Citation in usual form, showing service on John J. Bennett, Jr., and Henry S. Manley, filed Dec. 14, 1934, omitted in printing.

[fols. 152 & 153] Citation in usual form, showing service on John J. O'Connor, filed Dec. 14, 1934, omitted in printing.

[fol. 154] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated on behalf of the respective parties to the appeal and cross-appeal herein, that the annexed transcript is a correct copy of the original papers on file with the United States District Court and contains all that is essential to the appeal and cross-appeal.

John J. O'Connor, Solicitor for Plaintiff, as Appellee and Cross-appellant; Henry S. Manley, Solicitor for Defendants, as Appellants and Cross-appellees.

[fol. 155] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 156] SUPREME COURT OF THE UNITED STATES

No. 604. No. 605

STATEMENT OF POINTS, ETC.—Filed Jan. 2, 1935

Pursuant to Rule 13, paragraph 9 of the Rules of this Court, the solicitor for each of the respective parties to the above entitled appeals each adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record as filed is necessary as a joint record for the consideration of both appeals, excepting from printing any duplication of the exhibits referred to [fols. 157 & 158] in the Submission of Motions and Stipulation of Facts'' and also omitting from printing the text of Chapter 158 of New York Laws of 1933 and of Chapter 126 of New York Laws of 1934.

Henry S. Manley, Solicitor for Appellants in #604 and for Appellees in #605. John J. O'Connor, Solicitor for Appellant in #605 and for Appellees in #604.

[fol. 159] [File endorsement omitted.]

Endorsed on cover: File No. 39,232, 39,233. D. C. U. S., S. New York. Term No. 604. Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., etc., Appellants, vs. G. A. F. Seelig, Inc. Term No. 605. G. A. F. Seelig, Inc., Appellant, vs. Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., etc. Filed December 27, 1934. File No. 604, O. T., 1934; 605, O. T. 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 604

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC.,

Appellants,

vs.

G. A. F. SEELIG, INC.

No. 605

G. A. F. SEELIG, INC.,

Appellant,

vs.

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL., ETC.,

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES UPON APPEAL, AS REQUIRED BY SUPREME COURT RULE 12.

The above-named defendants hereby file this statement showing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon ap-

peal to review the decree appealed from herein. The plaintiff likewise files the same statement showing the basis for its cross-appeal from part of the same decree.

A.

The statutory provisions believed to sustain appellate jurisdiction are Section 345 of Title 28 of the United States Code (Judicial Code, section 238, amended) and Section 380 of Title 28 of the United States Code (Judicial Code, section 266, amended).

B.

The statute of the State of New York the validity of which is involved in this cause is Chapter 126 of the Laws of 1934 of the State of New York (not yet officially compiled), which adds a new Article 21 and a new Article 21-A to the Agriculture and Markets Law of said State, being Chapter 69 of the Consolidated Laws of said State. The said statute provides for the regulation of the purchase, sale and distribution of milk in the State of New York, and requires the defendant Baldwin, as Commissioner of Agriculture and Markets, to fix the minimum prices at which milk may be purchased and sold in said State. The only part of said statute the validity of which is involved in this cause is sub-section 4 of Section 258-M of said Article 21-A, which reads as follows:

> "It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the

> state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

An identical provision in an earlier law (Ch. 158 of N. Y. Laws of 1933, section 312, g), and certain orders made under each statute, are indirectly involved.

C.

The final decree appealed from was made on November 16, 1934, and filed in the office of the Clerk of the District Court on November 21, 1934. The petition for the appeal, and likewise the petition for the cross-appeal, were presented to the District Court on December 13, 1934.

D.

This action was instituted to restrain the defendants, as State officers, from enforcing the section of the statute above quoted and the orders above referred to, on the ground that said statute and orders were arbitrary, unreasonable, oppressive and discriminatory, and had no relation to the protection of public health or public welfare, and were unconstitutional, illegal and void, and were in violation of Section 8 of Article I and of the Fourteenth Amendment to the Constitution of the United States, in that they deprived plaintiff of its property without due process of law and attempted to regulate and interfere with commerce between the States and caused an arbitrary interference with the freedom of contract; and further to enjoin the defendants from proceeding in any manner against the plaintiff or any other person, firm, corporation or association by reason of the fact of them or any of them dealing with the plaintiff. The bill of complaint herein prayed for both a preliminary and a permanent injunction.

Equitable jurisdiction was established by reason of the inability of the plaintiff to obtain the license which it was required by law to obtain, unless the plaintiff should first agree to comply with and obey the section of the statute complained of and the orders issued pursuant thereto. Continuation of plaintiff's business without first obtaining such license rendered the plaintiff and all milk dealers dealing with the plaintiff liable to the imposition of severe penalties and fines, and the officers, agents and employees of the plaintiff and of such milk dealers liable to imprisonment.

The cause was heard on June 8, 1934, before Honorable Learned Hand, Circuit Judge; Honorable William Bondy and Honorable Robert P. Patterson, District Judges, sitting as a Statutory Court convened pursuant to the provisions of Section 380 of Title 28 of the United States Code (Judicial Code, section 266, amended). The plaintiff offered as its proof, in addition to the bill of complaint, an affidavit by J. Daniel Dougherty and an affidavit by Walter J. Seelig, each verified May 28, 1934. Defendants offered as their proof an affidavit by Kenneth F. Fee, verified June 7, 1934. That hearing resulted in the rendering of an opinion (*G. A. F. Seelig, Inc.*, v. *Baldwin*, 7 F. Supp. 776, Aug. 2, 1934), and a decree which the Supreme Court has held to be an interlocutory decree, involving no error of discretion, and hence affirmed without consideration of the merits. (*Baldwin* v. *G. A. F. Seelig, Inc.*, 293 U. S. —, No. 398, October Term, 1934, decided Oct. 15, 1934.) Subsequently there has been presented before the same Statutory Court, upon the same papers and in addition upon an agreed statement of facts, the plaintiff's application for final injunction, opposed by the defendants, and the defendants' motion to dismiss, opposed by the plaintiff. The latter motion has been denied and the former motion granted in part and denied in part. In connection with that final decree, from which the appeal and cross-appeal now presented are prosecuted,

the District Court adopted findings of fact fulfilling the requirements of Equity Rule 70½, and referred to its opinion of August 2, 1934, for conclusions of law.

E.

A case believed to sustain appellate jurisdiction herein, being a similar appeal from a final decree of a Statutory Court under a law substantially identical, is *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. —, No. 27, October Term, 1934, decided Nov. 5, 1934.

Respectfully submitted.

JOHN J. O'CONNOR,
Solicitor for Plaintiff.
HENRY S. MANLEY,
Solicitor for Defendants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 604

CHARLES H. BALDWIN, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, AND OTHERS,

Appellants,

against

G. A. F. SEELIG, INC.,

Appellee.

No. 605

G. A. F. SEELIG, INC.,

Cross-appellant,

against

CHARLES H. BALDWIN, AS COMMISSIONER, ETC., AND OTHERS,

Cross-appellees.

CONCESSION AS TO JURISDICTION.

JOINT MOTION TO ADVANCE.

The appellants and appellee, and the cross-appellant and the cross-appellees, by their respective solicitors, do hereby acknowledge as to the appeal and cross-appeal due and sufficient service of the petitions for an order allowing the

appeal and cross-appeal, together with the assignments of error and the jurisdictional statement required by paragraph 1 of Rule 12 of the Revised Rules of this Court. They also acknowledge that their attention has been directed by appropriate statement to the provisions of paragraph 3 of such Rule, and none of them will file a statement disclosing any matter or ground making against the jurisdiciton asserted either for the appeal or the cross-appeal. No motion to dismiss or affirm will be filed under provisions of paragraph 4 of Rule 7 of such rules.

It is desirable that the constitutional questions presented be determined by this Court as promptly as is consistent with thorough presentation and deliberation. The appeals should be argued together upon one record, and are entitled to preferred and speedy determination under Section 380 of Title 28 of the United States Code (Judicial Code, § 266). The District Court has found to be unconstitutional a provision of the New York State milk control law which now affects the price paid for 30 per cent of the milk and cream consumed in the New York City market. It is important that it be finally determined as soon as possible whether the State of New York cannot protect its farmers, who produce the other 70 per cent, from lower price competition for their markets within the State. If the State is powerless to afford that protection it must be obtained under authority of the United States, or by interstate or industry compacts, or the farmers of New York State should suffer the ills of completely unregulated markets rather than the greater ills of partially regulated markets. The present milk control law in New York State is to expire March 31, 1935, and before that time the Legislature will take some action upon the situation, for which action a final decision in this case is needed guidance.

At present about fourteen States of the United States have similar milk control laws, with others in prospect, and

the problem of interstate milk is important to all or nearly all of them.

It is respectfully prayed that probable jurisdiction be found and the appeal and cross-appeal advanced and set down for argument at some specified early session of the Court.

Dated December 14, 1934.

JOHN J. BENNETT, JR.,
HENRY EPSTEIN,
HENRY S. MANLEY,
Solicitors for the Defendants, now Appellants and Cross-Appellees.
JOHN J. O'CONNOR,
Solicitor for Plaintiff, now Cross-appellant and Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, and others, *Appellants*, against G. A. F. SEELIG, INC., *Respondent*.	*No. 604.*
G. A. F. SEELIG, INC., *Appellant*, against PETER G. TEN EYCK, as Commissioner, etc., and others, *Respondents*.	*No. 605.*

BRIEF FOR APPELLANTS.

(In No. 604; also for Respondents in No. 605)

This is an appeal and cross-appeal from the United States District Court for the Southern District of New York. The only opinion of the Court below is reported at 7 F. Supp. 776. That opinion was written upon the granting of the temporary injunction, but the final decree refers to it and adopts it for justification of the permanent injunction. (R. 49, 64.)

Statement of the Case.

The statute involved is the Milk Control Law of New York State. That statute provides for the fixing of certain minimum prices below which milk shall not be purchased from producers by milk dealers selling milk for fluid consumption, and certain minimum prices below which milk shall not be sold by milk dealers to consumers. In two cases involving strictly intrastate transactions in milk those provisions have been sustained against attack under the Fourteenth Amendment. *Nebbia v. New York*, 291 U. S. 502, Mar. 5, 1934; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, Nov. 5, 1934. The present case involves a milk dealer engaged in importing milk from Vermont and selling it in New York City, and certain questions are presented under the Commerce Clause.

The milk market centering about New York City and including Newark and adjacent parts of New Jersey, is called the "New York Metropolitan District." Over 10,000,000 people live in the Metropolitan District, and 68 per cent of them live in New York City. Milk can be sold in New York City only if it comes from milk plants approved by its Health Department, and the same is true of the other municipalities involved. The area including all the approved plants is usually referred to as the "New York Milk Shed." It contains all of New York State and substantial parts of New Jersey, Pennsylvania and Vermont, plus small parts of a few other States. Approximately 70 per cent of the milk and cream consumed in the Metropolitan District is produced in New York State and approximately 30 per cent comes from other States. (1933 N. Y. Legis.

Doc. No. 114, pages 32-38; Finding 23 of the District Court, and Exhibit E annexed, R. 61, 47.)

G. A. F. Seelig, Inc. and Seelig Creamery Corporation are New York State corporations, closely affiliated in ownership and management. Seelig Creamery Corporation operates a milk plant at Fair Haven, Vermont, where it buys and receives milk from farmers. The entire output of the plant is sold to G. A. F. Seelig, Inc., under an annual contract, and this constitutes its principal milk supply. Delivery is made F.O.B. Fair Haven, Vermont. The milk goes to New York City and is sold there by G. A. F. Seelig, Inc., mostly to hotels and similar establishments and mostly in the same forty-quart cans in which it was loaded upon a train in Vermont. (Findings 4-13, R. 57.) Findings 8-10-11 are as follows:

> "Seelig Creamery Corporation buys from certain selected farmers or producers of the milk shed in and about Fair Haven, Vermont, all of the milk offered to it daily. About 450 forty-quart cans of milk are received there daily from about 125 farmers. This milk is pasteurized there (excepting milk which is to be bottled in New York City) and some of it is separated into cream. All of this milk goes to New York City by rail, in forty-quart cans, some in the form of milk and some in the form of cream. Each day the milk and cream, pasteurized and in cans owned by the plaintiff, is loaded into a railway car at Fair Haven, Vermont, consigned to the plaintiff at New York City. The daily shipment is somewhat over 200 cans of milk and about 20 cans of cream, which is shipped each day as a carload lot, F.O.B. Fair Haven, Vermont."
>
> "Upon arrival in New York City of the daily carload of milk from Fair Haven, Vermont, the car

is opened, some cans are taken upon the plaintiff's trucks to the customers, and some are taken to the 29th Street plant and either called for by customers or sent out in plaintiff's trucks for delivery to customers. The sales by the plaintiff of milk and cream are mostly to hotels, restaurants, clubs, hospitals and stores in New York City, and mostly it is delivered in the same forty-quart cans in which it came from Fair Haven, Vermont."

"About 10% of the milk is bottled in New York City and delivered to customers in bottles. Plaintiff has no pasteurizing and bottling facilities of its own in New York City, and this work is done for it by another milk dealer."

If this milk were purchased from producers in New York State it could not be sold within the State. The producers at Fair Haven are paid for it less than the minimum prices established for payment to New York State producers (Finding 20, and Exhibit D, R. 61, 48), and the Milk Control Law forbids sale to New York State consumers of milk which has been bought from producers too cheaply. One of the general provisions to that end is found in section 257, and is as follows:

"It shall be unlawful for a milk dealer to * * * in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter."

The statute attempts to apply the same policy to milk originating out of New York State and offered for sale therein. That provision is found in section 258-m, subdivision 4, and is as follows:

"It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced out-

side of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

The validity of that provision became a direct issue between the parties in May 1934. G. A. F. Seelig, Inc. was required to obtain a license in order to continue its milk business in New York City, but the Commissioner refused to license any dealer unless it would agree in writing to comply with the statute and orders issued thereunder, and, in the case of dealers handling milk produced outside the State, answer affirmatively the following questions:

"Do you agree not to sell within New York State, after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?"

"Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced without the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions?" (R. 62.)

Proceedings in the Case.

G. A. F. Seelig, Inc., being advised that the statutory provision was unconstitutional, was unwilling to make an application in the form required by the Commissioner, and without a license it was exposed to penalties numerous and severe. Accordingly it commenced this suit, to enjoin the Commissioner from his insistence upon the conditions alleged to be unconstitutional, and him and other officials from proceedings to enforce the statutory provision. No question is raised as to the propriety of the remedy.

The application for an injunction was heard by three judges, under provisions of United States Code, Title 28, Section 380. On August 2, 1934, the District Court rendered its decision, expressed in an opinion by Honorable Learned Hand, Circuit Court Judge. A decree was entered, somewhat uncertain in form as to whether it was interlocutory or permanent, and an appeal was taken to this Court, which on October 15, 1934, affirmed without argument or consideration of the merits, upon the view that the decree was interlocutory and involved no error of discretion.

Thereafter the parties submitted to the three-judge District Court the application of G. A. F. Seelig, Inc. for a final injunction, and the motion of the defendants to dismiss the bill of complaint. A stipulation of fact was entered into and submitted, which the District Court adopted as findings of fact for purposes of the final decree. No new opinion was written, or conclusions of law, but the final decree adopted the opinion previously written. Accordingly, the final decree

favors G. A. F. Seelig, Inc. as to the imported milk which it sells in cans, upon the view that they are "original packages" and cannot be regulated by the State, but holds that the State can regulate so much as is bottled.

The defendants appealed from that decree and the plaintiff took a cross-appeal from the part relating to bottled milk. On January 14 this Court found probable jurisdiction and assigned the appeals for argument on February 11.

Assignment of Errors.

The defendants assign the following errors:

1. The District Court erred in granting any final injunction herein against exacting from the plaintiff a certain agreement as a condition of issuing to it a license.

2. The District Court erred in granting any final injunction against prosecuting the plaintiff.

3. The District Court erred in refusing to dismiss the bill; and in each and every conclusion of law stated in its opinion and leading to the three errors previously assigned.

Summary of Argument.

POINT I. The purposes of the statute are to protect the health and welfare of New York State citizens. It does not discriminate against products coming into the State in interstate commerce. It is concerned with a problem which is predominantly local.

POINT II. Congress has not occupied the field in any exclusive manner; on the contrary State regulation has received some Federal encouragement.

POINT III. Each State may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is affected as an incident to such regulation.

POINT IV. A regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce; hence when its subject matter is primarily of local concern a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any Federal regulation is justifiable under the Commerce Clause.

POINT V. There is need that the State power be upheld. The decree below should be reversed insofar as it grants injunction against the defendants.

POINT I.

The purposes of the statute are to protect the health and welfare of New York State citizens. It does not discriminate against products coming into the State in interstate commerce. It is concerned with a problem which is predominantly local.

In *Nebbia v. New York*, 291, U. S. 502, 517, occurs the following statement:

"Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination."

Mr. Justice Roberts did not write that sentence, or any other in the opinion, except in careful reliance upon the data before the Court. At pages 70-75 of the Report of the Legislative Committee which drafted the Milk Control Law (1933 N. Y. Legis. Doc. No. 114) are stated the health implications of the statute:

"The consequences of very inadequate returns to the producers of milk are likely to manifest themselves (1) in a lowering of quality because of enforced relaxation of safeguards in the production and distribution of milk; (2) in a gradual curtailment of the supply of milk produced in the milk shed which meets the special requirements for New York and other cities; (3) in possible interruptions of the milk supply due to strikes and disorders.

The price of milk has a very definite relation to its quality. Strict supervision and control of milk supplies are necessary for the protection of public health, and to encourage generous use of this important food. At the same time, these sanitary regulations add much to the cost of producing and handling market milk. Regulations in respect to the examination and health of cattle tend to increase the investment which the farmer has to make in livestock, and the annual depreciation thereon. The regulations in respect to stables—floors, light, ventilation, whitewashing, separation of horses—and milk house separated from the stable, likewise add to the producer's investment and the overhead costs of producing milk.

The requirement that milk be cooled to 60 degrees or lower immediately after milking usually means putting up a supply of natural ice, or providing electrical refrigeration. A recent survey in Rhode Island showed the cost of electric cooling

on the farm to be from 12 to 14 cents per 100 pounds of milk, compared to 10 cents per 100 pounds for cooling with ice. If the price received for milk were such as to justify the purchase of electrical coolers, they soon would be generally used on the dairy farms and the quality of milk would be much improved. Special care in the handling of milk both on the farm and in the process of transportation and distribution is necessary to keep the bacteria count below the prescribed maximum, and this further increases the expense. Market milk must be delivered to the plant every day, usually at an early hour, while cream for buttermaking need be delivered only from once to three times a week.

* * * * *

"The effect of modern sanitary control upon the costs of producing and handling milk, explains in part the wide spread between the price paid for milk by the consumer and the price received by the producer. It also clearly indicates the necessity for a premium to the producer for market milk, over the price ordinarily received for milk which is produced for butter or cheese factories. Unless such a premium were paid, the producers obviously would not continue to go to the expense of meeting the special requirements for market milk. They would find it more profitable to deliver milk to cheese factories or cream to butter factories. Of course quality standards for market milk will be maintained during short periods when prices do not fully compensate producers or dealers for the necessary costs. However, an extended period of prices much below the costs of producing milk in accordance with these standards would inevitably have an unfavorable effect upon the quality of the milk supply. Eventually there would be a shortage of milk which fully met the requirements. Further, it must be realized that the sanitary requirements imposed by the cities and the state are minimum standards. Since a large part of the milk supply normally is well above these minimum standards, a considerable decline in

quality may occur without violating the official requirements.

This view of the probable effect of inadequate price returns upon the quality of the milk supply was effectively expressed by Dr. Paul B. Brooks, Deputy Commissioner of Health of the State of New York, in a letter to the Committee. 'In my opinion', said Dr. Brooks, 'there is no doubt but that the low price received by the producer for milk and the general disturbed conditions in the milk industry are bound to have an unfavorable effect on the safety and general quality of milk sold in the state.'

The statement of Dr. Russell [Chairman of the Milk Committee of the Department of Health, State of New Jersey] also emphasizes this point. 'In the long run,' he said, 'the public will get what it pays for. If sanitary regulations break down and become unenforceable, the public may get a cheap article, but it will not be either safe or wholesome.'

A similar view of the effect of low prices upon the quality of milk was expressed by Mr. Floyd Shimel, producer, and President of the Farm Bureau of Jefferson County, in his testimony before the Committee. '* * * Cheap milk will have its effect on quality. Lack of funds will mean that many of those improvements which tend towards better quality will not be had. Present continued low prices are bound to discourage the producer and there will be among some a feeling that quality, under present conditions, is not to them an important factor.'

* * * * * *

"In the long run the quantity of milk produced is determined by the price which the farmer receives. Of this there can be no doubt.

Price changes, either up or down, have both an immediate and a delayed effect upon production. The producer responds to price changes by increasing or decreasing the amount and quality of the grain ration fed to cows, and milk production is promptly affected thereby. He also responds

to price changes by increasing or decreasing the size of his herd. This is done mainly by raising more or fewer heifer calves, and the effect on milk production is not felt for at least three or four years. Meanwhile the production of milk is raised or reduced somewhat by selling more or fewer of the old and low producing cows, and by changes in the number of cows shipped into or shipped out of the state.

* * * * *

"For the immediate future, the production of milk in the New York milk shed probably will be ample. Reduced feeding apparently will not overcome the increased capacity for production, caused by the periodic increase in number of cows, or the reduced consumption due to unemployment. The outlook for later years is entirely different. That the supply of milk for the people of this state ultimately will be seriously reduced because of the extremely low prices received by farmers is certain. High prices then will be necessary to stimulate dairying and to restore the production of milk to a level from which it never should have been allowed to fall."

The Legislature in enacting the Milk Control Law made an express finding that there were objectionable trade practices in the production, sale and distribution of milk, "whereby the dairy industry in the state and the constant supply of pure milk to the inhabitants of the state are imperiled." "That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state." "That the danger to the public health and welfare is immediate and impending." The Report shows more definitely what perils to health and welfare were feared. The Legislature regarded it as unwise for milk consumers in New York State to drink milk supplied by producers who were underpaid, because of the danger

that health standards would not be maintained for such milk, and also because of the danger that the supply would not be maintained.

It is well known to everyone who has given serious attention to milk problems that around every great milk consuming center there forms an economic unit known as a "milk shed". Problems of production must be thought of in terms of that unit, even when the viewpoint of interest is the consuming market. Mr. Justice Roberts said (pages 517-518):

> "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed."

Although supplying New York State markets with milk is predominantly an industry of the State, the milk shed extends into other States, and underpaid farmers in the extra-state parts of the milk shed present the same dangers to New York State health and welfare as underpaid farmers within the State. The statute has a health purpose applicable to all milk produced for sale in New York State.

The appearance of novelty in the present case arises from the fact that this statute is a price regulation directly, and few such have heretofore been sustained. The novelty is in the approach and not in the underlying purpose.* It is well recognized that New York State can forbid unwholesome milk to be sold regardless of its source; but that New York State forbids

* See the dissenting opinion of Mr. Justice Stone in Ribnik v. McBride, 277 U. S. 350, 374: "I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property", etc.

cheap milk to be sold requires some adjustment of viewpoint. It may be urged that this regulation is primarily for the economic welfare of producers. The material quoted above indicates that this is too narrow a view of the purpose of the statute, but however that may be, since *Nebbia v. New York* the welfare protected by this statute has been recognized as within the scope of the police power, just as much as the health welfare of consumers, and it will justify giving the statute just as broad effects.

There is nothing discriminatory about the statute now involved. The orders fixing the minimum prices to producers allow producers in Vermont and Pennsylvania to sell their milk for shipment to New York just as cheaply as it could be sold by producers in New York. Equal quality milk brings an equal price everywhere, except that milk farther from market is worth less to the extent of the difference in freight rate. The freight differential fixed by the orders is the actual L. C. L. railroad freight rate. (R. 24.) That makes it possible for a farmer in northern Vermont to sell his milk for consumption in New York City at a price directly comparable with a farmer in any part of New York State; to the extent that carload rates or truck rates are more favorable than L. C. L. the more distant producer may actually have an advantage.

The best proof that this provision is not discriminatory is that Pennsylvania, the largest competitor for the New York market, supports it. The 1933 Milk Control Law was enacted in New York State on April 10. It contained the provision now in question in section 312, g. When New Jersey enacted its Milk

Control Law about a month later it copied the provision. Chapter 169, N. J. Laws of 1933, art. VII, 1, c. Pennsylvania enacted a Milk Control Law on January 2, 1934. Not only did it copy this provision, but it added to it another new provision intended to give it support (Act of Penn. General Assembly No. 37, section 18, h):

> "It is also declared to be the legislative intent that the producers of milk in this Commonwealth who sell their milk to milk dealers for shipment into and sale in another state, where prices to producers are regulated by a state board or other authority with powers substantially similar to the Milk Control Board established by this act, shall receive the same price that producers in such other state receive for milk purchased for similar purposes and under similar conditions, less a proper allowance for the transportation thereof. It shall be unlawful for any milk dealer, except in any cases in which the board shall otherwise determine, to pay to a producer within this Commonwealth, for milk to be sold in such other state, a price lower than that fixed by the state board or other authority in such other state for sale of milk in such other state for similar purposes and under similar conditions, minus a proper allowance for the transportation of the milk to the market in such other state."

The fact that the New York statute is not discriminatory was recognized by Circuit Judge Learned Hand in his opinion for the Court below. He said (R. 55):

> "We do not of course mean that the plan is not commendable in itself, or that the means are not well adapted to the end. Nebbia v. N. Y., 291 U. S. 502, has authoritatively settled the state's power, and it is easy to see how the whole scheme might be imperilled, and conceivably wrecked, unless foreign milk, bought at cut prices, could be kept

> out of competition with the domestic supply. Furthermore, though a complete exclusion would give even greater security, it might have been open to a charge of unfair discrimination, which cannot be made as it is. The act does not try to circumscribe the 'milk-shed' as equal competition defines it; it merely prevents price-cutting throughout its area. So put, there is much to be said for the propriety of the extraterritorial feature, and Congress might well be induced to sanction it as it stands. But that sanction is, we think, essential to its validity."

Cheese and butter and canned condensed milk are commodities that pass freely across the continent and enter into a nation-wide competition. Any regulation imposed upon those has a strong tendency to burden interstate commerce. The case for fluid milk and cream is different. Milk is a commodity which must be supplied steadily, day after day and even year after year, and it must come from sources inspected and kept up to high sanitary standards. Each milk shed tends to become a reasonably constant and well defined unit, centering about a particular market or markets. Such a business does not observe State lines, and yet it is predominantly local. The interests involved center about the particular market, and are not diffused throughout the Nation. Supplying fresh milk is a local business, like supplying water (*Hudson County Water Co. v. McCarter*, 209 U. S. 349); it is not a national business like supplying wheat. (*Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Shafer v. Farmers Grain Co.*, 268 U. S. 189.)

The regulation of the milk shed centering about the New York Metropolitan District is predominantly a local interest. Reference has already been made to

data showing that 70 per cent of the milk is produced in New York State. A wealth of additional data can be obtained from two booklets published by the Cornell University Agricultural Experiment Station, Ithaca, N. Y. One is *"A Statistical Study of Milk Production for the New York Market"*, written by M. P. Catherwood and published in April 1931; the other is *"The Supply Side of the New York Milk Market"*, written by H. A. Ross and published in September 1931.

POINT II.

Congress has not occupied the field in any exclusive manner; on the contrary State regulation has received some Federal encouragement.

It is well known that the United States has a paramount control over interstate commerce and when it occupies a particular field it can exclude the States from any regulation upon the same subject matter. However, it is apparent that Congress has not attempted to exclude the States from regulating the interstate shipment of milk and cream. As recently as 1927 it expressly recognized their right to regulate such a matter. The Act of February 15, 1927 (ch. 155; 44 Stat. 1101; U. S. Code, Title 21, §148) regulated the importation of milk and cream from Canada and other places outside the United States, and in the course of that statute Congress said:

> "Nothing in this Act is intended nor shall be construed to affect the powers of any State, or any political subdivision thereof, to regulate the shipment of milk or cream into, or the handling, sale or other disposition of milk or cream in, such State or political subdivision after the milk or cream shall have been lawfully imported under the provisions of this Act."

No change in that situation, so far as concerns the New York milk shed, has been produced by the Agricultural Adjustment Act of May 12, 1933. That Act confers upon the Secretary of Agriculture power:

> "To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties."

> "To issue licenses permitting processors, association of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or of any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof."

It is assumed that those provisions confer upon the Secretary of Agriculture power to regulate interstate commerce in milk moving into the New York market, but the fact is that he has not exercised the power in that market. His power to regulate completely certain other markets is in question*, and attempts to

* In the following cases United States District Courts either enjoined regulation of a milk market by the Secretary of Agriculture or other officers, or declined to support it. **Royal Farms Dairy v. Wallace**, 7 F. Supp. 560 (June 19, 1934, Dist. Ct. Md.); **Edgewater Dairy Co. v. Wallace**, 7 F. Supp. 121 (June 26, 1934, Dist. Ct. Ill.); **Hill v. Darger**, 8 F. Supp. 189 (Sept. 7, 1934, Dist. Ct. Calif.); **United States v. Greenwood Dairy Farms**, 8 F. Supp. 398 (Sept. 27, 1934, Dist. Ct. Ind.); **Douglas v. Wallace**, 8 F. Supp. 379 (Oct. 17, 1934, Dist. Ct. Okla.); **United States v. Neuendorf**, 8 F. Supp. 403 (Oct. 19, 1934, Dist. Ct. Ia.); **Royal Farms Dairy v. Wallace** (Nov. 17, 1934, Dist. Ct. Md.); **Columbus Milk Producers v. Wallace**, 8 F Supp. 1014 (Nov. 20, 1934, Dist. Ct. Ill.). See also, **Black v. Little**, 8 F. Supp. 867 (Nov. 21, 1934, Dist. Ct. Mich.)

negotiate a milk marketing agreement for the New York market have thus far been fruitless.* Officials of the Agricultural Adjustment Administration recently have been expressing willingness to cooperate with Milk Control Boards and urging the States which lack them to enact Milk Control Laws.**

POINT III.

Each State may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is affected as an incident to such regulation.

New York State has a motion picture censorship law, and will not permit to be exhibited to its citizens any picture which its censors regard as indecent. Most of the films are made in California. Not only does the New York censorship operate directly upon each film after it has came to rest in the State through channels of interstate commerce, but it can be demonstrated that the existence of the New York censorship affects indirectly what is done (and omitted) in Hollywood.

A few years ago, after Henry Ford had started manufacture of his model A automobile with only one

* From August 1933 to January 1934 an effort was made to work out a milk marketing agreement for the New York market, unsuccessfully. Early in 1934 the Secretary of Agriculture considered regulating the market by license, but his proposal was thought by the Attorney General of New York State to involve such an invasion of State powers as to be unconstitutional. See the opinion of the Attorney General, N. Y. Times of Feb. 3, 1934; see also article by Henry S. Manley in N. Y. S. Bar Asso. Bulletin of March 1934, pages 126-129. Another effort to draft a marketing agreement was commenced in September 1934 and recently has encountered difficulties. N. Y. Times, Jan. 13, 1935, first section, page 3; Dairymens League News, Jan. 15; Watertown N. Y. Daily Times, Jan. 18.

** See, for example, an address by A. H. Lauterbach, Chief of Dairy Section, A.A.A., before Nat. Co-op. Milk Producers Fed. at Syracuse, N. Y., Nov. 13, 1934, as reported in Dairymens League News of Nov. 20, pages 2, 15.

set of brakes, it was discovered that Pennsylvania required two independent sets of brakes. The Commonwealth maintained its position, and Ford revised his model, without litigation. In forty-seven other states the single-brake automobile was a legitimate article of commerce, but Pennsylvania was exercising a reasonable, even though somewhat independent, judgment for the protection of its citizens. This was its right, and had effects throughout the continent.

An Oklahoma commission prorated the production of petroleum from a common source to prevent waste. The order was upheld against attack by a corporation which was engaged in selling the petroleum and its products in interstate commerce. This was merely a regulation of production and within the power of the State. Nobody but the corporation and its counsel seemed to be much troubled about the fact that petroleum denied production in Oklahoma cannot be transported to another State or used in airplanes.

Late in 1932 New York State forbade cattle to be brought within its borders unless they came from herds free from Bang's disease. In 1932 there were imported into the State about 36,000 cattle and in 1933 less than 2,000. Presumably the Wisconsin cattle dealers who contested the issue were the greatest losers, but the Commerce Clause did not maintain them in carrying on an interstate commerce in cattle one in ten of which probably were bearers of a highly contagious disease.

Those are merely illustrations from present day businesses of the fact that a State may so exercise its police power as to have important incidental effects upon interstate commerce. It may regulate the use and sale of goods which have come to it in interstate com-

merce, the production of goods which are to go in such commerce, or even, in some cases, it may exercise its police power directly upon goods while they are in interstate commerce. Nothing in that is inconsistent with the history and purposes of the Commerce Clause.

The purposes of the Commerce Clause are two. The one originally of greater importance was to prevent discrimination by the several States, each designing to favor its own products and the local businesses of its citizens. The other, which has become of constantly increasing importance in recent years, is to authorize Congress to give interstate commerce a uniform regulation.

From those two purposes, and the fact that the States retain the mass of sovereign power, there have been derived 857 decisions of this Court interpreting the Commerce Clause.* Each of several commentators has built up a volume of principles and branches and exceptions so as to provide each of those 857 cases with its appropriate and preordained relationship by footnote to a balanced logical structure. Perhaps an equally correct view of the limitations imposed by the Commerce Clause upon State legislation can be stated in terms of three principles only, the third achieving flexibility of application in diverse cases by giving weight to practical differences.** Tax cases will be ignored for the most part in this brief, upon the view that they involve some considerations not applicable to regulatory statutes.***

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* Bernard C. Gavit, "The Commerce Clause of the United States Constitution", digests 839 decisions to the end of 286 U. S., not including all of the 1932 term. To the end of 1934 we count 18 more.

** Thomas Reed Powell introduces his discussion of "Current conflicts between the Commerce Clause and the State police power, 1922-1927", 12 Minn. L. Rev. 321, with the observation at page 324, "The decisions are to be presented not as the supporting data for black-letter principles but as a succession of particularistic though more or less related judgments."

*** See pages 41-42 of this brief as to the peculiarity of tax cases.

It will readily be agreed that there are two limitations upon State power corresponding to the two purposes of the Commerce Clause already mentioned. The State statute must not be discriminatory, and it must not conflict with any regulation of commerce enacted by Congress. Those are two definite principles or limitations.

Assuming that the State statute is not objectionable upon either of those grounds, but puts some incidental burden or restraint upon interstate commerce, the decision as to its validity will depend upon a balancing of the national and local interests practically involved. In other words, a State can burden interstate commerce some to afford necessary protection to its people, but it cannot burden interstate commerce much merely to protect its people a little.

The discussion of that proposition will be deferred until the next point of this brief. The present point is concerned only with giving definiteness, by a few illustrations, to a proposition which is probably obvious as a generality—that interstate commerce can be affected incidentally by a valid State regulation.

Plumley v. Massachusetts, 155 U. S. 461, sustained a statute which excluded oleomargarine colored in imitation of yellow butter, saying (468):

> "The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. * * * Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

Hennington v. Georgia, 163 U. S. 299, upheld a statute which prohibited running any freight train on Sunday. This Court said (317-318):

> "Local laws of the character mentioned [having a real relation to the domestic peace, order, health and safety of the people of the State] have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight."

Hygrade Provision Co. v. Sherman, 266 U. S. 497, involved the constitutionality of a statute of New York State forbidding the false and fraudulent labeling of meat as "kosher." The statute was sustained even as to sales in the original packages of meat of extra-state origin. Mr. Justice Sutherland delivered the opinion of the Court and in the course of it he said (503):

> "Lewis & Fox Company [one of the plaintiffs] is a Massachusetts corporation conducting a general provision supply business including the shipment and sale of original packages into and within the State of New York. It is this situation which forms the basis of the contention that the commerce clause is violated. It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination

against it, are fairly within the range of the police power of the State, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional regulation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce."

Packer Corporation v. Utah, 285 U. S. 105, upheld a statute against advertising tobacco on billboards, in a State which produces no tobacco and where the posters also were shipped in from without the State. Mr. Justice Brandeis said (111-112):

"The defendant contends also that the statute imposes an unreasonable restraint upon interstate commerce because it prevents the display on billboards of posters shipped from another State. * * * So far as the posters are concerned * * * the statute is aimed, not at their importation, but at their use when affixed to billboards permanently located in the State. * * * The prohibition is non-discriminatory, applying regardless of the origin of the poster. Its operation is wholly intrastate, beginning after the interstate movement of the poster has ceased. Compare *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 503; *Hebe Co. v. Shaw*, 248 U. S. 297, 304. See also *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 433. To sustain the defendant's contention would be to hold that the posters, because of their origin, were entitled to permanent immunity from the exercise of state regulatory power. The Federal Constitution does not so require. Compare *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 240, 241."

Bradley v. Pub. Util. Comm., 289 U. S. 92, upheld denial to a common carrier of permission to operate upon a particular highway, upon the ground that the

proposed route already was dangerously congested. Mr. Justice Brandeis said (95-96, citations omitted):

> "It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. * * * In the case at bar the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident. Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of the police power. It is primarily a state function, whether the *locus* be private property or the public highways. Congress has not dealt with the subject. Hence, even where the motor cars are used exclusively in interstate commerce a state may freely exact registration of the vehicle and an operator's license, may require the appointment of an agent upon whom the process may be served in an action arising out of operation of the vehicle within the State, and may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety. Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety."

Mintz v. Baldwin, 289 U. S. 346, sustained an order forbidding cattle to be brought into New York State except from herds free from Bang's disease. Mr. Justice Butler said (349-350):

> "The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the prevention of further spread of

> the disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate commerce as to contravene the commerce clause. [citing cases.] Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order."

Upon all of the foregoing, it is respectfully submitted that a State may use its police power to regulate business within its own borders to whatever extent is necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is affected as an incident to such regulation. That principle is well recognized and extensive in its effects.

POINT IV.

A regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce; hence when its subject matter is primarily of local concern a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any Federal regulation is justifiable under the Commerce Clause.

We already have stated the proposition that if a State statute does not discriminate against interstate commerce, and does not conflict with any regulation of commerce enacted by Congress, but puts some incidental burden or restraint upon interstate commerce, the

decision as to its validity will depend upon a balancing of the national and local interests practically involved. "A State can burden interstate commerce some to afford necessary protection to its people, but it cannot burden interstate commerce much merely to protect its people a little." (Page 22 of this brief.)

A statement so adaptable has at least the virtue of reconciling some difficult cases. It may afford them the only reconciliation of which they are capable, and be the true basis of their consistency. Mr. Justice Holmes stated the matter as follows in *Galveston etc. Co. v. Texas,* 210 U. S. 217, 225:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

The earlier cases involving state regulations of railroads, before Congress had so fully occupied that ground, afford some illustrations of the balancing of State and national interests. *Nashville etc. Ry. Co. v. Alabama,* 128 U. S. 96, upheld a State statute forbidding persons afflicted with color blindness from serving on railroads. The Court seems to have been impressed with the importance to public safety of having some regulation of the matter, and if State regulation were too great an inconvenience to commerce it was within the power of Congress to assume the responsibility. *New York etc. Ry. v. New York,* 165 U. S. 628, upheld a State statute prohibiting heating of passenger cars by stoves, and observed that the statute had "a

real substantial relation to an object as to which the State is competent to regulate, namely, the personal security of those who are passengers on cars used within its limits." A long line of cases upholding reasonable regulations by the States of railroad personnel and equipment can be cited to the same effect. *South Covington etc. Ry. v. Covington,* 235 U. S. 537, upheld some regulations, and invalidated others upon the ground that they were "unreasonable" and hence direct burdens upon interstate commerce. *Seaboard, etc. R. v. Blackwell,* 244 U. S. 310, invalidated upon the same reasoning a Georgia Law requiring trains to slacken speed at every grade crossing. Compare, *Southern R. Co. v. King,* 217 U. S. 524. *Hennington v. Georgia,* 163 U. S. 299, upheld a statute which prohibited the running of any freight train on Sunday. It is quite possible that the case would be decided differently today than forty years ago, upon the practical view that the national interest in continuous freight service is today more forceful than the local interest in Sabbath observance. State statutes requiring passenger trains to stop at county seats have been sustained in three cases *(Gladsen v. Minnesota,* 166 U. S. 427; *Cleveland etc. R. Co. v. Illinois,* 177 U. S. 514; *Gulf etc. R. Co. v. Texas,* 246 U. S. 58), and held void in one case *(Mississippi R. Com. v. Ill. Cent. R. Co.,* 203 U. S. 335), the decision in each case depending upon a balancing of local needs against the interests of interstate commerce. To similar effect are about a dozen cases wherein this Court has solemnly weighed the needs for train service by villages of various sizes, and the dislocation placed upon traffic by requiring the service to be given, so as to determine whether an order for such service "burdens interstate commerce".

A Texas statute requiring trains to start not later than 30 minutes after scheduled departure was held bad, apparently upon the view that it was unreasonable. *Missouri etc. R. v. Texas*, 245 U. S. 484.

In more recent times State regulation of automobiles and motor trucks has been subjected to judicial review as to its reasonableness and whether it is a burden upon interstate commerce. Until Congress acts in that field the tendency seems to be to hold that State regulation which satisfies the Fourteenth Amendment does not offend the Commerce Clause. See *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Michigan P. U. C. v. Duke*, 266 U. S. 570; *Buck v. Kuykendall*, 267 U. S. 307; *Bush and Sons Co. v. Maloy*, 267 U. S. 317; *Interstate Busses Corp. v. Holyoke St. R.*, 273 U. S. 45; *Morris v. Duby*, 274 U. S. 135; *Hess v. Pawloski*, 274 U. S. 352; *Clark v. Poor*, 274 U. S. 554; *Sproles v. Binford*, 286 U. S. 374; *Continental Baking Co. v. Woodring*, 286 U. S. 352; *Bradley v. P. U. C.*, 289 U. S. 92; *Hicklin v. Coney*, 290 U. S. 169.

In only three of those cases was the State regulation held invalid. In *Michigan P. U. C. v. Duke*, it was held that requiring private contract motor carriers to become common carriers was a violation of the Commerce Clause and also of the Fourteenth Amendment. Mr. Justice Butler said (page 577):

> "It is well settled that a State has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it."

The cases of *Buck v. Kuykendall* and *Bush & Sons Co. v. Maloy* involved limitations upon competition in the use of the public highways by common carriers for hire. The plaintiff in each case was engaged exclusively in interstate transportation, some significance was attached to the policy implied in Federal-aid highways that State highways be open to interstate commerce, and the regulation was of a sort peculiarly difficult for each State to administer independently, as was illustrated by the fact that Buck's proposed auto stage line from Portland to Seattle had been certified by Oregon to be necessary and by Washington to be objectionable. The purpose of Washington was one that would justify the regulation as applied to intrastate carriers, but also it was one that could be effectuated reasonably well if limited to that class. Under all the circumstances the burden imposed upon interstate commerce seemed to be direct, substantial, selfish and unnecessary. A few years later a regulation which imposed an equal burden upon interstate commerce, but for the clearly avowed purpose of protecting public safety upon the then congested highways, was sustained. *Bradley v. Pub. Util. Comm.*

Instrumentalities of commerce which by their nature tend to have important effects upon the safety and welfare of the inhabitants of the States through which they pass, such as trains and motor carriers, necessarily have been submitted to a considerable amount of regulation, and until Congress occupies the field any reasonable State regulation is upheld. Other instrumentalities, such as telegraph companies and express companies, have less need for regulation under the police power, and tend to receive their principal

regulation from Congress. For one reason or another interstate ferries and bridges and navigation have been primarily a matter of Federal concern. Most of the decisions about State regulation of those instrumentalities have been to the effect that the regulation is a direct burden upon interstate commerce. That conclusion follows from the nature of the instrumentalities; they are not subject to important local interests to which their regulation under the police power is "incidental".

A State can quarantine against diseased animals which have come to it in interstate commerce *(Kimmish v. Ball,* 129 U. S. 217; *Missouri, etc. R. v. Haber,* 169 U. S. 613; *Rasmussen v. Idaho,* 181 U. S. 198; *Reid v. Colorado,* 187 U. S. 137; *Asbell v. Kansas,* 209 U. S. 251). Sometimes such cases are explained upon the ground that "diseased animals are not legitimate articles of commerce" and hence a State can forbid them admission within its borders. Obviously that statement argues in a circle. Animals which have merely been exposed to disease likewise can be barred *(Smith v. St. Louis etc. R. Co.,* 181 U. S. 248, 255-256; *Mintz v. Baldwin,* 289 U. S. 346). The only case where such a quarantine was held bad under the Commerce Clause could equally well have been decided under the Fourteenth Amendment, upon the ground that the regulation was unreasonable. *(Hannibal etc. R. v. Husen,* 95 U. S. 465.) The Court said that the State statute went beyond what was needed to protect State interests.

Similarly, inspection laws have been upheld as to tobacco, coal, lumber, fertilizer, beer, hides, oil and

stock food. The types of inspection laws disapproved in *Minnesota v. Barber*, 136 U. S. 313, *Brimmer v. Rebman*, 138 U. S 78, and *Voight v. Wright*, 141 U. S. 62, were deliberately discriminatory and unreasonable; those cases might equally well have been decided under the Fourteenth Amendment.

In the exercise of its police power a State may prohibit or condition the sale within its borders of various commodities which have come from other States, not only to protect the health and morals of its people, but also for their economic protection. *Plumley v. Massachusetts*, 155 U. S. 461, related to oleomargarine colored in imitation of yellow butter, and negatived the proposition that a State is powerless to prevent the sale of articles manufactured in or brought from another State, if their sale may cheat people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance indicate (Page 474). The case of *Collins v. New Hampshire*, 171 U. S. 30, holding invalid a law requiring that oleomargarine be colored pink, could equally well have been decided under the Fourteenth Amendment. *Schollenberger v. Pennsylvania*, 171 U. S. 1, held invalid a statute applicable to uncolored as well as yellow oleomargarine. One peculiar element in the case seems to have been that the Federal government had taxed oleomargarine and was thought to have recognized it as a respectable article of commerce (pages 8-9, 18-19), and there is some indication in the opinion, notwithstanding its citation of *Powell v. Pennsylvania*, 127 U. S. 678, that the Court regarded the regulation of uncolored oleomargarine as unreasonable.

Austin v. Tennessee, 179 U. S. 343, upheld a prohibition of the selling of cigarettes, saying (349):

> "We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that if the action of the State legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

The case of *Crossman v. Lurman,* 192 U. S. 189, upheld a New York statute against adulterated coffee.

In *Savage v. Jones,* 225 U. S. 501, Mr. Justice Hughes said (524-525):

> "The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. [Citations omitted.] But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

To similar effect, see *Price v. Illinois,* 238 U. S. 446, involving retail sale of a canning compound which contained boric acid, and *Armour & Co. v. North Dakota,* 240 U. S. 510, which upheld a statute requiring lard to be sold in containers of certain standard sizes, and *Corn Products Rfg. Co. v. Eddy,* 249 U. S. 427, 432-433. *Hebe Co. v. Shaw,* 248 U. S. 297, sustained a prohibition against sale in Ohio of condensed milk made in part from cocoanut oil, to save the pub-

lic from the fraudulent substitution of the wholesome but cheaper product. Mr. Justice Holmes first concluded that the law did not violate the Fourteenth Amendment and then stated that it did not violate the Commerce Clause either (page 303). The case of *Hygrade Provision Co. v. Sherman,* 266 U. S. 497, is to similar effect, and already has been quoted.

Silz v. Hesterberg, 211 U. S. 31, upheld New York in prohibiting, during the closed season on native game birds, possession within its borders of dead game birds of those or other varieties. An importer was convicted for possessing game birds taken in England and Russia. This is an illustration of the result to be reached when the protection of an important State interest is weighed against a relatively insignificant burden upon interstate commerce.

In the *License Cases,* 5 How. 504, State liquor license laws were held valid, against even a sale in the original package of liquor received from another State. In deciding *Austin v. Tennessee,* 179 U. S. 343, there was some dictum to similar effect (page 348) including the following:

> "If the legislative body come deliberately to the conclusion that a due regard for the public safety and morals requires a suppression of the liquor traffic, there is nothing in the commercial clause of the Constitution, or in the Fourteenth Amendment to that instrument, to forbid its doing so."

The fact is, however, that the decisions of the Court from *Bowman v. Chicago etc. R. Co.,* 125 U. S. 465, to *Rosenberger v. Pacific Express Co.,* 241 U. S. 48, have treated interstate transactions in intoxicating liquor

much more protectively than similar transactions in diseased cattle or colored oleomargarine or a considerable number of other commodities subjected to local suspicion or disapproval. In the oleomargarine case it was suggested that the justification for giving the States greater scope to regulate that commodity than was recognized for beer was that colored oleomargarine was an instrument of fraud and genuine beer was relatively inoffensive. (*Plumley v. Massachusetts*, 155 U. S. 461, 474). A recent commentator on the Commerce Clause (Bernard C. Gavit, *supra*) says that the liquor decisions are peculiar:

> "The Supreme Court has clung tenaciously to the theory that an intrastate sale of intoxicating liquor could be prohibited under the Fourteenth Amendment (*Mugler v. Kansas*, 123 U. S. 623) but that an interstate sale could not be prohibited under the Commerce Clause. (*Leisy & Co. v. Hardin*, 135 U. S. 100; *Kirmeyer v. Kansas*, 236 U. S. 568). The difference in result can only be explained on the ground that the court decided the commerce clause cases on something other than the real facts. The court ascribed to the right or privilege to do interstate business a sanctity which it properly does not enjoy. State action which is reasonable under the Fourteenth Amendment ought to be a reasonable justification for a state prohibition of interstate commerce. The fact of interstate commerce in this type of case weighs but little; the Federal government and those engaged in interstate commerce have no reasonably compelling interest in selling a commodity which a state has otherwise reasonably adjudged to be unfit for sale." (page 54.)

State regulations of peddlers are strongly under suspicion of being discriminatory against goods of extra-state origin. *Welton v. Missouri*, 91 U. S. 275, *Webber v. Virginia*, 103 U. S. 344, and *Corson v. Maryland*, 120

U. S. 502, involved statutes obviously having such a purpose. The leading case of *Robbins v. Taxing District,* 120 U. S. 489, involved a Tennessee statute imposing a tax upon all drummers, "not having a regularly licensed house of business in the Taxing District." The invalidity of such a statute can be explained either upon the ground that it involves a concealed discrimination, or that its application is directly upon an instrumentality of interstate commerce without being incidental to the service of some proper State purpose. The most recent of that line of cases is *Real Silk Mills v. Portland,* 268 U. S. 325. Had the ordinance there involved required only a bond to insure final delivery of the ordered goods, supported by evidence that such a requirement was needed to meet an actual evil and was suited to that purpose, presumably the ordinance would have been sustained. Compare *Continental Baking Co. v. Woodring,* 286 U. S. 352, 365-366. A local regulation of peddlers and order takers inherits and must meet a considerable weight of suspicion, but if sincerely undertaken to protect a genuine local interest it should not be invalid because of incidental burdens upon interstate commerce.

The cases thus far considered have mostly been concerned either with State regulation of instrumentalities of interstate commerce or else with regulation of goods by the State where they are delivered or attempted to be delivered. There are some interesting cases about regulation of goods in the State where they are produced, which illustrate the same general principles. In *Geer v. Connecticut,* 161 U. S. 519, it was held that the State could prohibit the transportation of its wild animals beyond its borders. *Lacoste v.*

Dept. of Conservation, 263 U. S. 545, upheld a tax by Louisiana upon hides of wild animals and alligators, involving somewhat similar considerations. *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, held invalid a Louisiana statute which prohibited removal from the State of the waste involved in shrimp packing. The statute was held bad because the burden it imposed upon interstate commerce was direct and deliberate and not incidental to any proper State purpose. Mr. Justice Butler said (page 13):

> "The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi [Mississippi] plants."

McLean v. Denver & Rio Grande R., 203 U. S. 38, involved a statute which provided for inspection of all hides of slaughtered cattle and a record to be kept of brands and other data. There was provision for inspectors of hides, who were to receive a fee of ten cents for each hide. It was made an offense for any railroad to receive an uninspected hide for shipment out of the Territory of New Mexico, and the case arose under that provision. Mr. Justice Day said that the purpose of the statute was to discourage cattle-stealing, and the provision about shipment was necessary for that purpose. He upheld it, saying (page 55):

> "The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of people in the Territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think

> such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong."

Sligh v. Kirkwood, 237 U. S. 52, upheld a Florida statute forbidding sale or shipment from its borders of citrus fruits immature or otherwise unfit for consumption. This was justified as a protection of Florida's reputation in the fruit business, and undoubtedly had a strong tendency to support its market for the better grades of fruit. Mr. Justice Day said (60-62):

> "Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State. * * * The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

Lemke v. Farmers Grain Co., 258 U. S. 50, held invalid a North Dakota statute regulating grain buying. Mr. Justice Day stated that North Dakota was a great grain-growing State, producing annually large crops, particularly wheat, for shipment beyond its borders. The principal markets were at Minneapolis and Duluth, and there was practically no market in North Dakota. Purchases were generally made with the intention of shipping the grain to Minneapolis (pages 53-54). The statute showed a comprehensive scheme to regulate the buying of grain. Purchases could only be made by those who held licenses from the State

and acted under a system of grading, inspecting and weighing fully defined in the act. The State grain inspector had power to determine the margin of profit to be realized by the buying, which necessarily meant that he fixed the buying price, inasmuch as the selling price was established by competition (pages 56-57). The majority of the Court concluded that grain buying, under the circumstances involved, necessarily was interstate commerce, and the statute was a direct regulation of it and unconstitutional. It said nothing to encourage the idea that the price fixing features of the statute would have been sustained under the Fourteenth Amendment if they had been applied primarily to intrastate transactions, or even if limited to those.

That decision was followed in *Shafer v. Farmers Grain Co.*, 268 U. S. 189. The statute involved was somewhat like that involved in the Lemke case and was of very ambitious scope. Mr. Justice Van Devanter, who delivered the majority opinion, noted that 90 per cent of the wheat bought in North Dakota was shipped outside the State. He stated the general rules which might be applicable as follows (page 199):

> "The decisions of this Court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here; one, that a state statute enacted for admissable state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause; and the other, that a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. These rules although readily understood and entirely

> consistent, are occasionally difficult of application; as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudication has been consistent and uniform."

Mr. Justice Van Devanter concluded that the regulation of the North Dakota grain trade fell within the second of the rules stated, because it attempted to exercise a large measure of control over wheat buying, about 90 per cent of which was in interstate commerce. As an example of a more modest statute, imposing burdens upon interstate commerce only incidentally, he cited *Merchants Exchange v. Missouri,* 248 U. S. 365.

The two North Dakota wheat cases involved a type of regulation with which the Court obviously was less sympathetic than with that involved in *Sligh v. Kirkwood.* Because of the nature of the regulation and the peculiar facts of the North Dakota wheat trade the burden upon interstate commerce was direct rather than incidental. Mr. Justice Holmes, in his opinion in *Superior Oil Co. v. Mississippi,* 280 U. S. 390, 396, alluded to the wheat cases as follows:

> "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

A State can condition the production of a natural resource within its borders upon payment of a tax (*Heisler v. Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron*

Min. Co. v. Lord, 262 U. S. 172; *Hope Natural Gas Co. v. Hall,* 274 U. S. 284; *Utah Power & Light Co. v. Pfost,* 286 U. S. 165), even when it is obvious that the article produced is destined to go in interstate commerce. Similarly the State can condition the production of petroleum within its borders, although destined to go in interstate commerce, upon methods of production being employed which are not wasteful or unfair to adjoining owners. (*Champlin Rfg. Co. v. Comm.,* 286 U. S. 210). The State cannot condition production upon the article being withheld from interstate commerce (*Oklahoma v. Kansas Nat. Gas Co.,* 221 U. S. 229), or, what is a lesser degree of the same thing, upon the people of the State of production being preferred in its sale. (*Penn. v. West Virginia,* 262 U. S. 553.)

Mr. Justice Holmes in his dissenting opinion in the case last cited said, "I know of no relevant distinction between taxing and regulating in other ways." (page 601.) The fact that the Court upheld West Virginia in imposing a production tax upon gas (*Hope Natural Gas Co. v. Hall*), but not in regulating its production by requiring that the needs of its citizens be first supplied (*Penn. v. West Virginia*), indicates that there is a distinction between the limitations imposed by the Commerce Clause upon the taxing power and those imposed upon the police power. The case of *Sonneborn Bros. v. Cureton,* 262 U. S. 506, is thought by some persons to indicate the same thing. To avoid that question this brief discusses very few tax cases. It would seem that some difference between tax cases and police power cases would necessarily arise from the practical implications of those different purposes.

Procurement of revenue is obviously an appropriate purpose of State legislation, justifying some incidental burdens upon goods and facilities in interstate commerce, but the avoidance of tax duplication and other considerations relevant to the purpose may set the limits upon its exercise somewhat differently from those upon a particular exercise of the police power.

Preserving to its people an adequate water supply is by long custom and the essential nature of the commodity a more appropriate and important State purpose than preserving a supply of gas or petroleum. Perhaps that reasoning, which Mr. Justice Holmes stated as, "the limits set to property by other public interests," explains why a riparian proprietor has not the same right to withdraw a water supply from the State as he can gas or oil. The decision is that the State can forbid taking water for the purpose of removing it in interstate commerce. *(Hudson County Water Co. v. McCarter,* 209 U. S. 349.)

Thus far under this point enough cases have been considered to illustrate, in a fair way, the limitations which the Commerce Clause places upon State exercise of the police power. The cases cited fall roughly into three groups. The first group includes regulations affecting instrumentalities of interstate commerce, such as trains, automobiles, motor trucks and busses. Reference is made to telegraph companies, express companies, ferries and bridges and navigation. Perhaps order takers should be mentioned here, and the grain elevators of North Dakota. The second group includes regulations of goods by the State of destination, such as cattle quarantines, weights and inspections, laws

about oleomargarine and fraudulent and adulterated foods, imported game and liquor. The third group includes regulations of goods by the State of production, such as game and shellfish, hides in New Mexico, Florida oranges, North Dakota wheat, natural gas and petroleum, and water.

The effort has been to illustrate a process of decision, rather than cite only favorable cases. Of 66 cases cited (ignoring a few which are inconclusive or merely incidental to argument) 40 resulted in upholding the State regulation and 26 were adverse. The proportions, at least, seem to be approximately representative, because of 72 cases decided by this Court in the last fifteen years 49 resulted in upholding the State regulation and 23 were adverse.*

It is respectfully submitted that the process of decision illustrated by cases of State regulatory statutes in fields not taken over by the Federal government involves answering three questions: *First,* is the statute sincerely and reasonably directed to a proper purpose of government so that it can be justified under the Fourteenth Amendment. *Second,* is the purpose primarily a matter of local concern; is it important

* Tax cases are omitted, and so are cases where the State statute conflicted with a Federal regulation. The 72 cases are believed to include all other cases decided by this Court in the years 1920-1934 wherein a State statute or regulation was challenged under the Commerce Clause. Decision was adverse to the State statute or regulation in the following 23 cases: **Wells Fargo & Co. v. Taylor, 254 U. S. 175; St. Louis, etc. R. v. P. S. C., 254 U. S. 535; Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282; Lemke v. Farmers Grain Co., 258 U. S. 50; Lemke v. Homer Farmers El. Co., 258 U. S. 65; St. Louis Etc. R. v. P. S. C., 261 U. S. 369; Davis v. Farmers Co-op. Co., 262 U. S. 312; Penn v. West Virginia, 262 U. S. 553; Atchison R. Co. v. Wells, 265 U. S. 101; Missouri v. Kansas Nat. Gas Co., 265 U. S. 298; Michigan P. U. C. v. Duke, 266 U. S. 570; Flanagan v. Fed. Coal Co., 267 U. S. 222; Buck v. Kuykendall, 267 U. S. 307; Bush & Sons Co. v. Maloy, 267 U. S. 317; Real Silk Mills v. Portland, 268 U. S. 325; DiSanto v. Pennsylvania, 273 U. S. 34; P. U. C. v. Attleboro Co., 273 U. S. 83; Mayor v. McNeely, 274 U. S. 676; Foster-Fountain P. Co. v. Haydel, 278 U. S. 1; Johnson v. Haydel, 278 U. S. 16; Lawrence v. Ry. Co., 278 U. S. 228; Michigan C. R. v. Mix, 278 U. S. 492; Furst v. Brewster, 282 U. S. 493.**

relatively to the burdens which it is charged with placing upon interstate commerce. *Third,* is the statute non-discriminatory against interstate commerce. A negative answer to any one of those questions may readily be phrased as an answer to another, or stated in terms of the dogma that a State cannot regulate or directly burden interstate commerce,* but the decisive considerations in any case precipitate about one or another of those three questions. To restate the matter as it is stated in the heading to this point, the rule is that a regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce, and that means that when its subject matter is primarily of local concern a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any Federal regulation is justifiable under the Commerce Clause.

POINT V.

There is need that the State power be upheld. The decree below should be reversed insofar as it grants injunction against the defendants.

It is often said nowadays that there is a fatal weakness in the interpretation which has grown up around the Commerce Clause; that its interpretation as a restraint against State action has so far outrun interpretation permitting Federal regulation that much business about which there ought to be a law has es-

* See note at 27 Col. L. Rev. 573 entitled, "The 'direct burden' test of the constitutionality of State statutes affecting interstate commerce".

caped into a twilight zone beyond the reach of either.* Usually that line of reasoning proceeds from the fact or the assumption that the individual States cannot regulate effectively some matter, such as child labor in industries, to the conclusion that the United States should regulate it.

In the present case we are dealing with something that a State can regulate effectively unless the Commerce Clause forbids. There is probably no fluid milk market in the United States involving more interstate milk than New York City and most of them are entirely intrastate. Yet even as to New York City the business is predominantly intrastate, and conditions are such that the State which is interested through its consuming public and through the greater proportion of the producers can enforce a uniform rule. It does not appear that any neighboring State resents that claim of power; Pennsylvania and New Jersey, at least, agree through their statutes that the price of milk paid to the producer should be fixed by the consuming market. The case of natural gas presents some analogies and some differences. *Penn. Gas. Co. v. P. S. C.*, 252 U. S. 23; *Peoples Nat. Gas. Co. v. P. S. C.*, 270 U. S. 550; *Western Dist. Corp. v. P. S. C.*, 285 U. S. 119. The case of goods made by child labor and moving freely in a nation-wide commerce presents no true analogy, not only because of the difference in the commerce but also because of the difference in the purpose for regulating the manufactured goods of extra-state origin. A State regulating the milk shed from which its consumers de-

* Edward S. Corwin, "The Twilight of the Supreme Court", page 20; Rexford G. Tugwell, "The Industrial Discipline", pages 191-203; Robert L. Stern, "That Commerce which concerns more States than one", 47 Harv. L. Rev. 1335; Kenneth F. Burgess, "The twilight zone between the police power and the Commerce Clause", 15 Iowa L. Rev. 162.

rive a daily supply of food regulates the entire area with an even purpose related to the product itself; a State forbidding child labor within its borders and forbidding other States to send it the products of their child labor has supplemented a regulation of local health or morals, not directed to anything inherent in the product, by another regulation purely economic in purpose directed at the product. It is doubted that a State can do that; the extent to which a State can "burden" interstate commerce in endeavors to eliminate child labor is suggested by the case of *C. & O. R. Co. v. Stapleton,* 279 U. S. 587, 593.

When the Health Department of New York City inspects farms and milk plants in other States for shipment of milk to its market it obviously acts beyond the borders of the State and produces substantial effects upon interstate commerce. The nature of milk commerce is such that it is accustomed to that type of regulation. If there were objection, conceivably the inspectors might withdraw within the borders of New York State and turn back each shipment of milk from an unapproved source. Undoubtedly a State may exercise its police power within its borders in the light of relevant facts beyond them, and notwithstanding effects produced thereby in other States. *Carroll v. Greenwich Ins. Co.,* 199 U. S. 401; *Hammond Packing Co. v. Arkansas,* 212 U. S. 322; *Standard Oil Co. v. Tennessee,* 217 U. S. 413; *German Alliance Ins. Co. v. Hale,* 219 U. S. 307; *Crescent Oil Co. v. Mississippi,* 257 U. S. 129; *Firemen's Ins. Co. v. Beha,* 30 Fed. 2nd 539, affd. 278 U. S. 580; *Western Dist. Co. v. Comm.,* 285 U. S. 119.

The regulation now involved is effective after the milk produced in Vermont has come to New York State and "come to rest within the State." *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 478-479; *Edelman v. Boeing Air Transp.*, 289 U. S. 249, 252; *Minnesota v. Blasius*, 290 U. S. 1, 8-12; and *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 95, are tax cases interpreting that language. If the purpose of the State statute is an appropriate State concern there comes a time when the statute becomes effective against the milk brought from Vermont.

The District Court has held that the time is defined by the doctrine of "original packages." The State may not interfere when G. A. F. Seelig, Inc. sells its cans of milk to a restaurant, but may pounce upon the restaurant proprietor when he sets a glass before a customer. The District Court seemed little satisfied with the result, but thought it required by precedents:

> "Whatever may be thought of so accidental a measure for the distribution of governmental powers, in view of the recent approval of the doctrine it does not seem to us an inferior court is free to treat it as open to debate. So far as we are to have a more realistic canon, it must be worked out step by step by the Supreme Court." (R. 52.)

The "original package" has often been suggested as the physical symbol of the importers' interests protected in the name of interstate commerce, and its breaking up as the uttermost limit to which those interests will be protected. Probably this is a rule of thumb, and something will depend upon the relative urgencies of the Federal interests and State interests practically involved in a particular case. In recent

years it is perceived that there can be no fixed rule for separating interstate commerce from intrastate commerce because they run into each other as day runs into night; in their extremes they are different but there is no definite and unvarying dividing line. Not always will the "original package" receive immunity from State regulation *(Hygrade Provision Co. v. Sherman,* 266 U. S. 497; *Sonneborn Bros. v. Cureton,* 262 U. S. 506), and in one case Federal interests were found to extend beyond the breaking up of the "original package", and "follow the adulterated or misbranded article at least to the shelf of the importer." *(McDermott v. Wisconsin,* 228 U. S. 115, 135.)

Presumably milk bottled in another State and shipped in cases is not sold at retail in an "original package" and may be regulated at that time. *May v. New Orleans,* 178 U. S. 496; *Austin v. Tennessee,* 179 U. S. 343; *Cook v. Marshall Co.,* 196 U. S. 261; *Purity Extract Co. v. Lynch,* 226 U. S. 192, 200-201; *Price v. Illinois,* 238 U. S. 446, 454-455; *Armour & Co. v. North Dakota,* 240 U. S. 510, 517; *Hebe Co. v. Shaw,* 248 U. S. 297, 304.

It is respectfully submitted that under all the circumstances the regulation by the State should be upheld, and for milk in cans no less than for milk in bottles. If the State regulation is held invalid there will be no remedy for the milk shed as a whole except through concurrent State and Federal action; but if the State regulation is upheld and any inconvenience to interstate commerce is experienced the Secretary of Agriculture already has power to correct that situation. As was said by Mr. Justice McReynolds and

Mr. Justice Sutherland, dissenting in *Oregon-Washington Co. v. Washington*, 270 U. S. 87, 103:

> "It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine Federal bureau."

A similar thought was expressed by Mr. Justice Holmes in *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 395:

> "The importance of the commerce clause to the Union of course is very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts."

It is respectfully submitted that there is need that the State power be upheld. The decree below should be reversed insofar as it grants injunction against the defendants.

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Solicitors for Appellants in No. 604 and for Respondents in No. 605.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, and others, *Appellants*, against G. A. F. SEELIG, INC., *Respondent*.	*No. 604.*
G. A. F. SEELIG, INC., *Appellant*, against PETER G. TEN EYCK, as Commissioner, etc., and others, *Respondents*.	*No. 605.*

REPLY BRIEF.

The main purpose of this brief is to limit the constitutional issues presented by the Brief for the Appellee. Two other topics suggested by that brief will be commented upon.

A.

Point III of the Brief for the Appellee (pages 13-15) should be ignored. No such issue was presented to

the District Court or by the assignment of errors before this Court. The bill of complaint at paragraph "Fifteenth" refers to Order 33. (R. 6-7.) At paragraph "Thirtieth", subdivision "C", there is some reference to the Fourteenth Amendment and to deprivation of the benefits of certain contracts, but the charge is made against the statute. (R. 12.) The only allegation of the bill of complaint about the contracts is found in the second sentence of paragraph "Eighth". (R. 4; compare, R. 30-31, 42, 45-47.) The answering affidavit said:

> "G. A. F. Seelig, Inc., does not object to paying Seelig Creamery Corporation the amounts required to comply with Official Order Number 33 and the other orders mentioned above; at least it did comply with them by an additional payment in November 1933 after its non-compliance was called to its attention by suit. Apparently its unwillingness relates entirely to payments from Seelig Creamery Corporation to producers, and the two corporations insist upon the right of selling in New York City, after it has come to rest there, milk purchased from Vermont producers at prices less than must be paid by competitors buying from New York State producers." (R. 44-45.)

We believe that G. A. F. Seelig, Inc., assented to that statement and nothing more was heard in the District Court about any grievance because the statute and Order 33 or either of them required G. A. F. Seelig, Inc. to pay Seelig Creamery Corporation more than was required by contract. The District Court in its opinion took no notice of any such grievance. (R. 49-56.) It was not considered in drafting the findings. (R. 57-63.) No relief from it was asked or obtained in connection with the injunction. (R. 64-65.) The as-

signment of errors suggests no issue except what appears from the opinion. (R. 66-67.)

Now by its Point III the Appellee says that it has been complying with Order 33, by making extra payments to Seelig Creamery Corporation and others, and it attempts to set that matter up as a grievance under the Fourteenth Amendment. If the regulation of prices is otherwise constitutional the existence of a contract is no obstacle. *Sproles v. Binford*, 286 U. S. 374, 390-391. Moreover, payment from one pocket of Walter J. Seelig to another under such duress as is afforded by an invalid statute or order is not a ground for granting an injunction. It is respectfully submitted that there is no need to go into those matters, because the issue was not pressed below or by assignment of errors before this Court.

B.

The Appellee and Seelig Creamery Corporation are two separate corporations, the latter entirely owned by Walter J. Seelig and the former owned 62½ per cent by him and 37½ per cent by Gustav R. Seelig. The two corporations share offices in New York City and share the services of Walter J. Seelig as treasurer. (finding 13, R. 59.) At page 14 of Appellee's brief it is said:

> "Appellee has no contract whatsoever with the producers who supply the creameries in Vermont. Neither is appellee in a position to insist that said creameries pay their producers such prices as may be fixed by the New York Milk Control Board. • • • Concededly the Vermont creameries are not paying their producers the New York classified price. It must also be conceded that appellee cannot enforce such payments."

As a practical proposition we doubt if the Court will be much impressed with the argument that Walter J. Seelig and Gustav R. Seelig, doing business under the corporate form of G. A. F. Seelig, Inc., are unable to control the conduct of Walter J. Seelig, sole owner of Seelig Creamery Corporation. *Western Dist. Corp. v. P. S. C.*, 285 U. S. 119. However, we do not care for any victory based upon such a narrow reason. Let it be assumed that the relations between the two corporations are only those of a Vermont corporation buying milk from producers in Vermont, and selling and delivering there daily to a New York corporation. Even so, if it is determined that the statute is valid there will be no practical difficulty about complying with it. It already is covered by paragraph 6 of the contract between the Seelig corporations:

> "The Seller agrees that all products are to be up to the standards of the New York Board of Health requirements, and such products to be legal for sale in the New York City market." (R. 46.)

C.

Although our earlier brief has shown that the statute is not discriminatory (Appellants' brief, pages 14-16) that matter is so important we cannot ignore the following statement from page 18 of Appellee's brief:

> "The real purpose of the New York milk statute in question is, we contend, to force all New York milk dealers to purchase their milk from New York producers, and thus eliminate all foreign competitors of the New York producer from that market to which the New York farmer contends, through his legislature, he has first right."

The New York farmer may sometimes make such a contention, but not through his legislature. This stat-

ute concedes to Vermont farmers everything that it claims for New York farmers. It denies all of them the right to sell to New York consumers milk for which the producer has been paid less than a certain minimum price, identical for New York farmers and for farmers of other States. The only thing denied to Vermont farmers is to compete with New York farmers for New York markets upon terms which are thought to be so dangerous to New York consumers that they are forbidden to New York farmers. The only thing denied to Mr. Seelig and his two corporations (turning now to his real grievance instead of the one he professes) is to take a profit forbidden to dealers in New York milk, under conditions which make the excessive profit a public menace.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 604.

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others, *Appellants,*

against

G. A. F. SEELIG, INC., *Respondent.*

No. 605.

G. A. F. SEELIG, INC., *Appellant,*

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others, *Respondents.*

BRIEF FOR APPELLEE

(In No. 604; also for Appellant in No. 605)

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IN THE
OCTOBER TERM, 1934.

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, and others, *Appellants,* against G. A. F. SEELIG, INC., *Respondent.*	No. 604
G. A. F. SEELIG, INC., *Appellant,* against CHARLES H. BALDWIN, as Commissioner, etc., and others, *Respondents.*	No. 605

BRIEF FOR APPELLEE

(In No. 604; also for Appellant in No. 605)

The Opinion Below.

The opinion of the court below (*G. A. F. Seelig, Inc.* v. *Baldwin,* 7 F. Supp. 776, Aug. 2, 1934), rendered after hearing by a statutory court, convened pursuant to the provisions of Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended), resulted in the entry of a decree, which decree was, upon appeal

to the Supreme Court, held to be an interlocutory decree, involving no error of discretion, and hence affirmed without consideration of the merits (*Baldwin* v. *G. A. F. Seelig, Inc.*, 293 U. S. ____, memo. Oct, 15, 1934).

Subsequently there was presented before the same statutory court, upon the same papers and in addition thereto an agreed statement of facts (R. 57), plaintiff's application for a final injunction, opposed by defendants, and defendants' motion to dismiss, opposed by plaintiff. The latter motion was denied and the former motion was granted in part and denied in part. In connection with the final decree (R. 64), from which the appeal and cross-appeal now presented are prosecuted, the statutory court adopted the findings of fact (R. 57) and referred to its opinion of August 2, 1934 (R. 56) for conclusions of law.

Jurisdiction.

The respective parties hereto have presented to this Court a joint statement disclosing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the decree in question, as required by Supreme Court Rule 12, paragraph 1, and on January 14, 1935 this court found probable jurisdiction.

An application for an early hearing, made by all parties, was granted (January 14, 1935) and the two appeals assigned for argument on February 11, 1935.

Statement of Facts.

In this suit for injunction, the plaintiff, G. A. F. Seelig, Inc., a milk dealer, contests the validity, under Section 8 of Article I and the Fourteenth Amendment to the Constitution of the United States, of provisions of the New York Milk Control Law fixing the price to be paid to producers in the State of Vermont for milk shipped into and sold in the State of New York.

A District Court of three Judges, organized in accordance with Section 266 of the Judicial Code (U. S. C. Title 28, Section 380) has denied a motion by the defendant The Division of Milk Control of New York State, to dismiss the bill, and granted in part and denied in part the motion of the milk dealer for a permanent injunction.

The Attorney General of the State of New York and the District Attorney of New York County were made parties defendant in the Court below because it is their duty to enforce the criminal provisions of the New York Milk Control Law.

No testimony was taken, but the allegations of the bill of complaint and the affidavits of the respective parties were consolidated in a stipulated statement of facts and adopted as findings herein (R. 57).

Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, who, as head of the Division of Milk Control of that State, is charged with the enforcement of provisions of the Milk Control Law, has taken what may be fittingly called the chief or main appeal herein from the final decree of the District Court (R. 64) and is designated in this brief as the appellant.

G.-A. F. Seelig, Inc., the milk dealer, has taken a cross-appeal from certain parts of the same decree and for the sake of brevity and clearness is hereinafter called the appellee.

The grievance of the milk dealer is that the decree of the District Court excluded from the injunctive protection afforded thereby the milk shipped into New York and there pasteurized and bottled.

For an understanding of the milk dealer's position in respect to the part of the interstate shipment of milk that is bottled within New York City, certain regulations of the Sanitary Code of the Board of Health of the Department of Health of New York City must be considered. The first of these is that the sale of loose milk in

New York City is absolutely forbidden and the second is that all bottling must be done at the point or place of pasteurization of the milk.

The regulations of the Sanitary Code of the Board of Health of the Department of Health of the City of New York to which reference is made are as follows:

> *Regulation 159-B, Section (a)*: "No milk shall be offered for sale, sold or shall be dispensed direct to the consumer in the City of New York in any container other than in bottles or individual containers, filled, and properly capped and labeled at the plant where pasteurized except where such milk is dispensed to the consumer from a pump or other similar mechanical dispensing device approved by the Board of Health in accordance with the regulations made and adopted thereunder."
>
> *Regulation 129, Section (e)*: "Pasteurized milk shall be bottled at the place of Pasteurization."

It is not economically practical for the milk dealer to break up at the Creamery in Vermont from which shipment is made each day's shipment of milk into smaller than can lot units, as may be necessary to meet the daily requirements of every customer to whom the milk is consigned.

Part of the daily shipment is therefore taken by the milk dealer to a pasteurizing plant in New York City, the milk processed, bottled and immediately reclaimed by the dealer and delivered to its customers in sealed bottles. The Court below found that this processing in New York caused this part of the shipment to lose its interstate characteristics, and as part of the mass of the products of New York State to be subject to the control of the New York Division of Milk Control. This is the only error urged by G. A. F. Seelig, Inc., as cross-appellant herein.

G. A. F. Seelig, Inc., obtains its principal supply of milk from Seelig Creamery Corporation, which in turn purchases from certain selected farmers or producers located in and about the Seelig Creamery Corporation receiving plant at Fair Haven, Vermont. Seelig Creamery Corporation is not a producer of milk and its operations are confined wholly to the State of Vermont. Seelig Creamery Corporation and G. A. F. Seelig, Inc., are, and always have been, separate and distinct corporate entities and neither corporation owns, holds or controls stock in the other.

G. A. F. Seelig, Inc., takes the total daily output of the Seelig Creamery Corporation. A purchase of milk, known in the milk trade as a "spot purchase", is occasionally made by G. A. F. Seelig, Inc., from some other creamery also located at Fair Haven, Vermont, as its daily needs may require.

Complete reports have at all times been made by G. A. F. Seelig, Inc., to the Milk Control authorities, showing the disposition and use made within New York State of the milk and cream imported from Vermont. No question of a violation of the Sanitary Code of New York City is charged against G. A. F. Seelig, Inc., in respect to the handling of the milk, nor has any question been raised that G. A. F. Seelig, Inc., has changed in any way, since the advent of the milk control statutes, to evade or attempt to evade the disputed provisions of said statutes, its customary method of conducting its business.

Although no question has been directly raised as to the propriety of the remedy sought by G. A. F. Seelig, Inc., in this proceeding, in view of this Court's decision in *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. ..... (Nov. 5, 1934), it is considered proper to set forth briefly (Point II of this Brief, p. 10) the matter believed to justify the bringing of this injunction action.

Specification of Errors.

The only error that G. A. F. Seelig, Inc., as cross-appellant, will urge is that the Court below was in error in excluding from the injunctive protection of the decree herein the milk brought in from Vermont and processed and bottled in New York.

Outline of Argument.

(As Cross-Appellant)

POINT I. As the processing and bottling of milk are component parts of the interstate transportation, the District Court was in error in excluding such part of the shipment from the injunctive protection of its decree.

(As Appellee)

POINT II. Appellee has pursued the only remedy available.

A. Appellee has fully exhausted the administrative remedies provided in the Milk Control Law (N. Y. Laws 1933, Chap. 158), Sec. 312 (d) (f).

B. Except that it waive its right to attack the constitutionality of the Statute in question, appellee had to seek injunctive relief.

POINT III. The Statutory provision attacked deprives appellee of its property without due process of law.

POINT IV. The Statutory provision attacked is unconstitutional and invalid under Article I, Section 8, of the Constitution.

POINT I.

As the processing and bottling of milk are component parts of the interstate transportation, the District Court was in error in excluding such part of the shipment from the injunctive protection of its decree.

Approximately ten per cent of appellee's daily shipment of milk from the creameries at Fair Haven, Vermont, comes in as raw or unpasteurized milk. This raw milk, in appellee's own cans, is taken upon arrival in New York City to a pasteurizing plant there, processed, bottled and delivered back to appellee in sealed bottles bearing its own name and label. These bottles are then delivered by appellee to its customers. This method of handling its daily import of milk has been followed by the appellee for many years.

We contend that the Court below was in error as to the time when this part of the shipment became part of the mass of the goods of New York State. All of the sales of milk, whether in bottles or cans, were made by the appellee before the milk to fulfill the sales was sent to New York. The very nature of the product requires that the milk dealer shall have a consumer ready to take delivery of the fluid milk as soon as imported. Storage for future sale or delay of any sort destroys the value of the fluid milk. Irrespective of how transported, the sales of fluid milk and cream are in fact contracts for the sale and delivery of fluid milk across State lines. Such transactions are interstate commerce in its essence and until the delivery is completed the interstate movement of the milk has not come to an end. "In determining what is interstate commerce, courts look to practical considerations and the established course of business." *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, at page 10.

Doubt arises, of course, where there is any sort of interruption in the journey. Here the temporary arresting of the milk is required as a health measure (Regulation 159-B, Section (a); Regulation 129, Section (e) of the Sanitary Code of the Board of Health of the Department of Health of the City of New York) (Brief, p. 4). It must be pasteurized and placed in sealed bottles to insure its safety and goodness. It is not stored or mingled with other or similar goods forming any part of the domestic mass of New York State. The fluid milk, before and after pasteurization, retains its identity as far as anything of that nature could possibly do so. Concededly it is the same in quantity and just as distinguishable from the mass of domestic goods of the State as it was before pasteurization.

It is our contention that the decisions of this Court in such cases as *General Oil Co.* v. *Crain,* 209 U. S. 211, *Bacon* v. *Illinois,* 227 U. S. 504, *Champlain Realty Company* v. *Brattleboro,* 260 U. S. 366, and *Minnesota* v. *Blasius,* 290 U. S. 1, are not controlling under the facts of the instant case. Those cases involved the question of local taxation upon goods placed in storage. In the case at bar the Milk Control Law is not a tax statute, nor is the milk brought in from Vermont placed in storage in any manner.

The rule of the "original package" is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. The law does not seek to find what the parties *may* do, but what, in the usual course, it is expected they will do.

> "If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond." *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105, at page 113.

It is admitted that appellee's transportation of the milk from Vermont to New York is interstate commerce. If so, it continues such until it reaches "the point where the parties originally intended that the movement should finally end" (*Illinois Central R. R. Co.* v. *Louisiana R. R. Commission,* 236 U. S. 157, page 163). Appellee's customers cannot be expected to call at the pasteurizing plant for the milk which was ordered to be delivered to their doorsteps. Practice, intent and the typical method followed by the importer determine the character of the unity or continuity of the transaction. The wants of appellee's customers are known, and the milk is transported, not to be held, but to be used. Pasteurization takes place, not because the importer wills it, but because the health regulations require the milk to be so treated. Any interruption in the interstate movement of the milk thus caused is merely casual and incidental, and the transaction is to be treated as single and continuous. The essential unity of the transaction remains the final test. *Swift* v. *United States,* 196 U. S. 375; *Rearick* v. *Pennsylvania,* 203 U. S. 507.

We therefore repeat that the District Court erred in excluding that part of the milk shipped into New York and processed there, from the injunctive protection afforded by its decree and that said decree should be amended so as to include all the milk shipped to New York from Vermont by the appellee.

POINT II.

Appellee has pursued the only remedy available.

A. Appellee has fully exhausted the administrative remedies provided in the Milk Control Law (N. Y. Laws 1933, Chapter 158), Sec. 312 (d), (f).

Shortly after the original Milk Control Law (N. Y. Laws 1933, Chap. 158) became effective (April 10, 1933), the Milk Control Board called appellee's attention to the fact that its monthly reports made to said Board showed certain discrepancies between the prices fixed by the Board as the basis of payment to producers in New York State and the prices received by producers in Vermont from whom appellee's milk supply was obtained, and that appellee was thereby violating provisions of the Board's order known as "Official Order No. 33" (R. 25), Official Order No. 33 having been made in pursuance of provisions of subdivision (g) of Section 312 of Chapter 158, N. Y. Laws of 1933, which reads as follows:

> "(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

Appellee immediately protested the right of the Milk

Control Board to enforce said Official Order No. 33 in respect to appellee's business, and asserted its constitutional right to continue to import its milk and conduct its business as it had been doing for many years.

Pursuant to provisions of subdivision (f) of said Section 312, which reads as follows:

> "(f) The board may upon its own motion, or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order."

hearings were held before the Milk Control Board, whereat appellant contended its order was a correct interpretation of provisions of subdivision (g) of said Section 312 quoted above (Brief, p. 10), while the appellee again asserted its right to disregard said order and subdivision (g) of Section 312 of the Milk Control Law as constitutionally invalid.

Because of the apparently irreconcilable positions of the respective parties, the Milk Control Board as then constituted (November, 1933) commenced an action in the Supreme Court of the State of New York against the appellee, wherein it sought to enjoin the appellee from selling milk in New York State in alleged violation of the statute in question.

Before this action was brought to trial, the first Milk Control Law terminated by its own provisions and like-

wise the license of the appellee (March 31, 1934). Although the issue in the state court action remained a live one, the milk dealer, with the termination of the original Milk Control Law, was now without a license and could not longer operate as such milk dealer, and there was then, of course, no purpose in the Milk Control Board pursuing the action in the State Court.

B. Except that it waive its right to attack the constitutionality of the statute in question, appellee had to seek injunctive relief.

Upon the enactment of the present milk control statute (N. Y. Laws 1934, Chap. 126, not yet officially compiled) and the refusal of the Division of Milk Control, which succeeded to the powers and duties of the former Milk Control Board, to issue a milk dealer's license to appellee upon application made therefore, except that appellee should first agree in writing to obey all the provisions of the new milk control law, which contains a provision similar to that of the original statute, the validity of which appellee has all through this controversy resisted, appellee had no other remedy than to proceed as it did for injunctive relief. Such remedy was not open to appellee in the State courts, since under the laws of New York a court of that State may not enjoin the enforcement of a criminal statute. Continuation of appellee's business without first obtaining such license rendered appellee and all milk dealers dealing with appellee liable to the imposition of severe penalties and fines (Sections 39, 40 and 41 of Article 3, Farms and Markets Law, N. Y. Laws 1922, Chap. 48) (R. 26-27) and the officers, agents and employees of the appellee and of any and all milk dealers dealing with appellee liable to imprisonment.

The only way appellee and others dealing with it could

escape the aforementioned penalties was for appellee to waive in writing its right to test the validity of the statute in question.

Further appeal or protest to the Division of Milk Control was, of course, out of the question, and an attempt to challenge the validity of the statute complained of by a single violation thereof would have resulted in the complete suspension of appellee's business until there could be a determination of such issue.

Appellee's right to equitable relief was, we contend, fully established by the foregoing facts.

Stafford v. *Wallace,* 258 U. S. 495;
Ex Parte Young, 209 U. S. 123.

POINT III.

The statutory provision attacked deprives appellee of its property without due process of law.

G. F. Seelig, Inc., the appellee, has at all times followed and complied with the orders of the milk control authorities governing the sales prices to be charged its consumers upon the sale of its milk within New York State (R. 62).

Appellee likewise has for many months prior to the commencement of this suit, paid to Seelig Creamery Corporation and to such other creameries from which it may occasionally purchase part of its milk supply in Vermont, the amounts required of it to be paid to comply with Official Order No. 33 and all other orders of the milk board in relation to the fixation of prices.

Compliance with these orders by the appellee has necessitated the abrogation of the contracts existing between appellee and Seelig Creamery Corporation (R. 45). This has caused the appellee to be deprived

of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution. *American Express Company* v. *Iowa*, 196 U. S. 133.

Appellee has no contact whatsoever with the producers who supply the creameries in Vermont. Neither is appellee in a position to insist that said creameries pay their producers such prices as may be fixed by the New York Milk Control Board.

This situation results in the New York milk authorities striking at the appellee through the medium of declaring the milk so purchased in Vermont to be outlawed if and when that milk is brought into New York State for sale therein.

Concededly the Vermont creameries are not paying their producers the New York classified price (R. 48). It must also be conceded that appellee cannot enforce such payments. Appellee might, of course, withdraw from the field entirely, but we contend there is no legal obligation upon it to do so. Vermont has been for a great many years the source of its milk supply and it should be permitted to continue to conduct its business in that milk shed free of the restrictions that the milk control law of New York enforce upon it.

Under Official Order No. 17 (R. 16), the milk control authorities have established, for payment to producers of milk sold within the State of New York, a unified classification price plan, whereby the ultimate price per quart paid to the farmer is based upon the use to which the milk dealer puts the milk. There are approximately nine possible classifications of use, all at fixed—but different—prices, with the average thereof being paid to the producer at the end of each month or other accounting period, as may be arranged between the parties concerned.

For many years prior to the enactment of the New York milk control laws, farmers were paid, generally, upon the basis of what was known unofficially in the

milk business as the "Sheffield price", which price is believed to be, though never actually known, based upon a weighted average of fluid milk purchased by the Sheffield company.

We are informed and believe that in those milk sheds supplying the City of New York where no price regulations are in force, the "Sheffield price" is still used. We know this to be the situation in and about the Fair Haven, Vermont, milk shed—the one with which we are concerned. The producers in and about the Fair Haven milk shed are accordingly paid so much per quart or pound of milk furnished by them, without regard to how the dealer shall dispose of or use the same. The dealer runs all the risk of making a profitable or other use of the milk he has purchased.

Although the so-called underpayments charged to the Seelig Creamery Corporation in Exhibit to Affidavit, folio 122 (R. 48) appear to be substantial, we know that it will stand without contradiction that the producers in the Fair Haven milk shed, paid at a price based upon the "Sheffield price", have actually received more per quart or pound for their milk during the period covered by Exhibit "D" than the average producer within the State of New York has received under the New York classified plan during the same period.

We therefore contend that compliance by the appellee with the statute complained of has deprived it of its property without due process of law.

Dobbins v. *Los Angeles,* 195 U. S. 223.

POINT IV.

The statutory provision attacked is unconstitutional and invalid under Article I, Section 8, of the Constitution.

The appellee protests the validity of subsection 4 of Section 258-m of Article 21-A of the Agriculture and Markets Law of New York State (New York Laws 1934, Chap. 126, not officially compiled), which reads as follows:

> "4. It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

The District Court held the above quoted section invalid so far as the act prevented the import of milk in cans.

Insofar as the opinion below covered the ground in respect to the milk in cans, we rely heavily upon its reasoning and shall not repeat it in this brief.

Under Point I of this brief, we have endeavored to set forth the grounds of our belief that the District Court was in error in excluding the so-called bottled milk as not within the protection afforded an interstate shipment and we contend that the total shipment of milk should be considered as one.

Holding to our desire not to burden this Court with a mere repetition of the reasoning and cases cited in the opinion below, we do wish, however, to add a few observations by way of supplement.

Approximately thirty per cent of the fluid milk marketed and consumed in the New York City market comes from other states (R. 61). The quantities and origins of this imported milk for the month of April, 1934, are set forth in Exhibit to Affidavit, folio 121 (R. 47).

Likewise, a substantial part of the milk produced within New York State and marketed in New York City passes through another state (New Jersey) on its way to the New York City market, which might better be described as the "Metropolitan market". The term "Metropolitan market" is described at page 33 of the Report of the Joint Legislative Committee to Investigate the Milk Industry—New York Legislative Document (1933) 114 (commonly known as the Report of the Pitcher Committee), as including a small area in Connecticut, New York City, five counties of New York outside of the City of New York and eight counties in New Jersey, with an aggregate population of more than ten million people. The territory of the Metropolitan market—composed of parts of three states—is therefore not a local one. It is an interstate market.

In view of the fact that milk is imported into New York from some ten different states (Exhibit to Affidavit, folio 121, R. 47), there is a general current of interstate commerce involved and it is therefore submitted that the control thereof should be by Congress, instead of by the several individual states, as it is at present.

In the case of *Stafford* v. *Wallace*, 258 U. S. 495, this Court pointed out that certain businesses are more of a national character than local. This may well be said of the milk industry, where, though not wholly like the business of a stockyard, the constant flow of commerce between the several states supplying the Metropolitan

market place the milk industry in much the same category as nation-wide industries and the control thereof should be left to Congress.

It was partly this distinction of what might or might not be validly controlled by state legislation upon which state control was declared improper in *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 and *Shafer* v. *Farmers Grain Co.*, 268 U. S. 198. In each of these cases it was declared that if the farmers of North Dakota were suffering from evils existent in the industry, it was for Congress, and not for the state legislature, to enact remedial legislation. The same may well be said of the milk industry in New York State.

Even in those cases where Congress has not exercised its paramount power, a state may not, in the management of its internal affairs, place unreasonable burdens upon interstate commerce. The question resolves itself into the problem of whether New York State has "directly" regulated interstate commerce. We contend it has.

The Minnesota Rate Cases, 230 U. S. 352.
Missouri v. *Kansas Natural Gas Co.*, 265 U. S. 298.

The provisions of the New York milk statute in question do not, of course, forbid the importation of the Vermont milk, but they do forbid sale of such milk after it has arrived in New York. What could be a more direct restraint upon interstate commerce?

The real purpose of the New York milk statute in question is, we contend, to force all New York milk dealers to purchase their milk from New York producers, and thus eliminate all foreign competitors of the New York producer from that market to which the New York farmer contends, through his legislature, he has first right. The accomplishment of such a purpose, i.e., to protect a local market by the exclusion of foreign com-

peting goods, is exactly the type of legislation against which the commerce clause of our Constitution is directed. Except and unless Congress sees fit to allow protective economic barriers between the States, the barrier that New York has attempted to place about its own milk producers is wholly without constitutional sanction.

We contend that the facts in the case at bar are very similar to those in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, and that this Court's decision in that case is decisive of the question of the invalidity of the New York milk control statute herein complained of.

In addition to the cases cited in the opinion of the Court below (R. 49) and those cited in this Brief, the following decisions, made since 1921, have held invalid States' statutes or regulations as contravening the Commerce Clause of the Constitution.

St. Louis & San Francisco Railway Co. v. *Public Service Commission of Missouri*, 254 U. S. 535.

Order of Public Service Commission as to the routing of two through interstate day passenger trains held invalid.

Lemke v. *Homer Farmers Elevator Company*, 258 U. S. 65.

North Dakota grain inspection act held invalid for the reasons set forth in *Lemke* v. *Farmers Grain Company* (*supra*), 258 U. S. 50.

St. Louis-San Francisco Railway Co. v. *Public Service Commission of Missouri*, 261 U. S. 369.

Order of Public Service Commission to stop through trains held invalid.

Davis v. *Farmers Co-operative Equity Company*, 262 U. S. 312.

Solicitation of traffic by railroads in states remote from their lines is part of their interstate transportation.

Pennsylvania v. *West Virginia*, 262 U. S. 553.

Attempt by a state to restrain piping of natural gas across state line held improper.

Atchison, Topeka & Santa Fe R. Co. v. *Wells*, 265 U. S. 101.

Writ of garnishment held void as applied against a foreign corporation.

Missouri v. *Kansas Natural Gas Co.*, 265 U. S. 298.

The transportation of gas through pipe lines from one state to another, for sale to distributing companies, is interstate commerce, so that the state authorities have no control over the rates to be charged for it, and the fact that Congress has taken no action in the matter is immaterial.

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570.

A state, under its police power, may not impose the duties and liabilities of a common carrier upon one engaged in performing a contract to transport merchandise for a single manufacturer over the public highways from a plant within a state to a destination in another state.

Buck v. *Kuykendall*, 267 U. S. 307.

A state may not prohibit the use of its highway to some, while granting it to others. The effect of such a regulation is not merely to burden, but to obstruct, interstate commerce.

Bush v. *Maloy,* 267 U. S. 317.

A state cannot forbid the use on its highways of motor vehicles operated by common carriers for hire, over regular routes, in interstate commerce, merely because existing lines of transportation would be prejudiced thereby.

Real Silk Hosiery Mills v. *Portland,* 268 U. S. 325.

An expressed purpose to prevent possible frauds does not justify state legislation which really interferes with the free flow of interstate commerce.

DiSanto v. *Pennsylvania,* 273 U. S. 34.

A state statute which by necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose for which it is passed, and cannot be sustained as an exercise of police power to prevent possible fraud in the sale of transportation tickets.

Public Utilities Commission v. *Attleboro Steam & E. Co.,* 273 U. S. 83.

The transmission of electric current from one state to another is interstate commerce, although the custody and title are transferred from vendor to purchaser at the state boundary.

Lawrence v. *St. Louis-San Francisco R. Co.,* 278 U. S. 228.

An order of a state railroad commission refusing to permit an interstate railroad company to change a terminal, the effect of which is to impair interstate service, violates the commerce clause of the Federal Constitution.

Furst v. *Brewster,* 282 U. S. 493.

Any state statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause.

Anglo-Chilean Nitrate Sales Corp. v. *Alabama,* 288 U. S. 218.

The constitutional protection against state duties on imports and state interference with interstate or foreign commerce extends to corporations as well as to individuals.

Finally.

It is respectfully submitted that the prayer for relief in the bill should be granted in all respects so as to include that part of the shipment of milk which is pasteurized and bottled in New York State.

JOHN J. O'CONNOR,
Solicitor for Appellee in No. 604,
and for Appellant in No. 605.

J. DANIEL DOUGHERTY,
On the Brief.

SUPREME COURT OF THE UNITED STATES.

Nos. 604 and 605.—October Term, 1934.

Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., Appellants,
604 *vs.*
G. A. F. Seelig, Inc., Appellee.

G. A. F. Seelig, Inc., Appellant,
605 *vs.*
Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, et al., Appellees.

Appeals from the District Court of the United States for the Southern District of New York.

[March 4, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

Whether and to what extent the New York Milk Control Act (N. Y. Laws of 1933, c. 158; Laws of 1934, c. 126) may be applied against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce is the question here to be determined.

G. A. F. Seelig, Inc. (appellee in No. 604 and appellant in No. 605) is engaged in business as a milk dealer in the city of New York. It buys its milk, including cream, in Fair Haven, Vermont, from the Seelig Creamery Corporation, which in turn buys from the producers on the neighboring farms. The milk is transported to New York by rail in forty-quart cans, the daily shipment amounting to about 200 cans of milk and 20 cans of cream. Upon arrival in New York about 90% is sold to customers in the original cans, the buyers being chiefly hotels, restaurants and stores. About 10% is bottled in New York, and sold to customers in bottles. By concession title passes from the Seelig Creamery to G. A. F. Seelig, Inc. at Fair Haven, Vermont. For convenience the one company will be referred to as the Creamery and the other as Seelig.

The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid

by dealers to producers. The validity of that system in its application to producers doing business in New York State has support in our decisions. *Nebbia* v. *New York*, 291 U. S. 502; *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163. Cf. *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194. From the farms of New York the inhabitants of the so-called Metropolitan Milk District, comprising the City of New York and certain neighboring communities, derive about 70% of the milk requisite for their use. To keep the system unimpaired by competition from afar, the Act has a provision whereby the protective prices are extended to that part of the supply (about 30%) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state. The statute, so far as pertinent, is quoted in the margin together with supplementary regulations by the Board of Milk Control.[1]

Seelig buys its milk from the Creamery in Vermont at prices lower than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the trans-

[1]Section 258 (m) (4), Article 21-a, New York Agriculture & Markets Law, L. 1934, c. 126, formerly section 312 (g), Article 25, L. 1933, c. 158: "It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced outside of the state becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State purchased under similar conditions, shall be unlawful."

Order of New York Milk Control Board, July 1, 1933: "Any continuous and regular purchase or sale or delivery or receipt of milk passing to a milk dealer at any place and available for utilization as fluid milk and/or cream within New York State, followed by such utilization in one or more instances, where the price involved in such purchase or sale or delivery or receipt is less than the sum of the minimum price established to be paid to producers for such milk plus actual costs of transporting and handling and processing such milk to the place and to the condition involved in such purchase or sale or delivery or receipt, hereby is forbidden."

action of its business unless it signs an agreement to conform to the New York statute and regulations in the sale of the imported product.[2] This the applicant declines to do. Because of that refusal other public officers, parties to these appeals, announce a purpose to prosecute for trading without a license and to recover heavy penalties. This suit has been brought to restrain the enforcement of the Act in its application to the complainant, repugnancy being charged between its provisions when so applied and limitations imposed by the Constitution of the United States. United States Constitution, Art. I, § 8, clause 3; Fourteenth Amendment, § 1. A District Court of three judges, organized in accordance with § 266 of the Juidical Code (28 U. S. C. § 380), has granted a final decree restraining the enforcement of the Act in so far as sales are made by the complainant while the milk is in the cans or other original packages in which it was brought into New York, but refusing an injunction as to milk taken out of the cans for bottling, and thereafter sold in bottles. See opinion on application for interlocutory injunction:—7 F. Supp. 776; and cf. 293 U. S. —, October 15, 1934. The case is here on cross-appeals. 28 U. S. C. § 380.

First. An injunction was properly granted restraining the enforcement of the Act in its application to sales in the original packages.

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices

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[2]The application blank contains the following questions which show the form of the required agreement: "Do you agree not to sell within New York State after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?"

"Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced without the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions?"

or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection laws." Constitution, Art. I, § 10, clause 2; *Woodruff* v. *Parham,* 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 112; and see *Brennan* v. *Titusville,* 153 U. S. 289; *Brown* v. *Houston,* 114 U. S. 622; *Webber* v. *Virginia,* 103 U. S. 344, 351; *Kansas City Southern R. Co.* v. *Kaw Valley Drainage District,* 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259. If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New York, supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milkshed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect the farmers outside New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established

by order of the Board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Mintz* v. *Baldwin*, 289 U. S. 346; *Reid* v. *Colorado*, 187 U. S. 137); milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justfy obstructions to the normal flow of commerce in its movement between states. Cf. *Asbell* v. *Kansas*, 209 U. S. 251, 256; *Railroad Co.* v. *Husen*, 95 U. S. 465, 472. One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy.

Many cases from our reports are cited by counsel for the state. They do not touch the case at hand. The line of division between direct and indirect restraints of commerce involves in its marking a reference to considerations of degree. Even so, the borderland is wide between the restraints upheld as incidental and those attempted here. Subject to the paramount power of the Congress, a state may regulate the importation of unhealthy swine or cattle (*Asbell* v. *Kansas, supra; Mintz* v. *Baldwin, supra*) or decayed or noxious foods. *Crossman* v. *Lurman*, 192 U. S. 189; *Savage* v. *Jones*, 225 U. S. 501; *Price* v. *Illinois*, 238 U. S. 446. Things such as these are not proper subjects of commerce, and there is no unreasonable interference when they are inspected and excluded. So a state may protect its inhabitants against the fraudulent substitution, by deceptive coloring or otherwise, of one article for

another. *Plumley* v. *Massachusetts,* 155 U. S. 461; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497. It may give protection to travelers against the dangers of overcrowded highways (*Bradley* v. *Public Utilities Commission,* 289 U. S. 92) and protection to its residents against unnecessary noises. *Hennington* v. *Georgia,* 163 U. S. 299. Cf., however, *Missouri, Kansas & Texas R. Co.* v. *Texas,* 245 U. S. 484, 488. At times there are border cases, such as *Silz* v. *Hesterberg,* 211 U. S. 31, where the decision in all likelihood was influenced, even if it is not wholly explained, by a recognition of the special and restricted nature of rights of property in game. Interference was there permitted with sale and importation, but interference for a close season and no longer, and in aid of a policy of conservation common to many states. Cf. *Geer* v. *Connecticut,* 161 U. S. 519; *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 11; *People ex rel. Silz* v. *Hesterberg,* 184 N. Y. 126, 131. None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.

Second. There was error in refusing an injunction to restrain the enforcement of the Act in its application to milk in bottles to be sold by the importer.

The test of the "original package," which came into our law with *Brown* v. *Marland,* 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. Cf. *Woodruff* v. *Parham, supra; Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218, 226. There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally wth other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Texas Co.* v. *Brown,* 258 U. S. 466, 475; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken

and the contents subdivided. "A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State." *Sonneborn Bros.* v. *Cureton, supra,* at p. 516. Cf. *McDermott* v. *Wisconsin,* 228 U. S. 115, 133; *Bowman* v. *Chicago & N. W. R. Co.,* 125 U. S. 465, 491; *Brimmer* v. *Rebman,* 138 U. S. 78; *Savage* v. *Jones, supra,* at p. 525; *W. U. Tel. Co.* v. *Foster,* 247 U. S. 105, 114; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493. In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Penn. Gas Co.* v. *Public Service Commission,* 225 N. Y. 397, 403. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumtances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont comeptition. To overcome that competition a common incident of ownership—the privilege of sale in convenient recep-

tacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate transactions were not meant to be a cover for retortion or suppression.

The distinction is clear between a statute so designed and statutes of the type considered in *Leisy* v. *Hardin,* 135 U. S. 100, to take one example out of many available. By the teaching of that decision intoxicating liquors are not subject to license or prohibition by the state of destination without congressional consent.[3] They become subject, however, to such laws when the packages are broken. There is little, if any, analogy between restrictions of that type and those in controversy here. In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass. So also the analogy is remote between restrictions like the present ones upon the sale of imported milk and restrictions affecting sales in unsanitary sweat-shops. It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.

The decree in No. 604 is affirmed, and that in No. 605 reversed, and the cause remanded for proceedings in accordance with this opinion.

It is so ordered.

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[3]The rule is different today under the Twenty-first Amendment. Art. XXI, § 2.